10-06-83	Kenneth Wiggins v. Eastern Assoc. Coal	WEVA 82-300-D
10-27-83	R.Collins & V.Kelley v. Sec. of Labor	EAJ 83-1
10-31-83	Southwestern Illinois Coal Corp.	LAKE 80-216

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10-03-83	International Minerals & Chemical Corp.	SE 82-20-M
10-04-83	U.S. Steel Mining Co., Inc.	PENN 83-3
10-04-83	U.S. Steel Mining Co., Inc.	PENN 83-39
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10-06-83	Monterey Coal Company	LAKE 80-413-R
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10-06-83	UMWA on behalf of Louis Maholic v. Andy Onficer and BCNR Mining Corp.	PENN 83-112-D
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10-11-83	Nugent Sand Company, Inc.	LAKE 83-57
10-11-83	Medusa Cement Company	LAKE 83-80-M
10-11-83	U.S. Steel Mining Company, Inc.	PENN 82-300
10-12-83	Little Sandy Coal Sales, Inc.	KENT 83-178-R
10-12-83	American Mine Services, Inc.	WEST 82-1-M
10-13-83	Edwin Webber v. Harrison Western Corp.	WEST 82-195-D
10-14-83	Pyro Mining Company	KENT 83-137
10-14-83	Medusa Cement Company	LAKE 83-74-M
10-14-83	Medusa Cement Company	LAKE 83-75-M
10-14-83	Medusa Cement Company	LAKE 83-76-M
10-14-83	Medusa Cement Company	LAKE 83-77-M
10-14-83	Medusa Cement Company	LAKE 83-81-M
10-14-83	U.S. Steel Mining Co., Inc.	PENN 83-52
10-14-83	Ross Island Sand & Gravel Co.	WEST 83-111-M
10-17-83	Clinchfield Coal Company	VA 82-51-R
10-17-83	Kennecott Minerals Company	WEST 81-393-M
10-19-83	MSHA/E. Gaddy v. Anchor Stone Company	CENT 81-258-D
10-19-83	R. F. H. Coal Company	KENT 83-246
10-19-83	U.S. Steel Mining Company, Inc.	PENN 83-40
10-24-83	Shamrock Coal Company, Inc.	KENT 83-207
10-25-83	U.S. Steel Mining Company, Inc.	PENN 83-47
10-28-83	Energy Fuels Nuclear, Inc.	WEST 80-446-M
10-28-83	Westmoreland Coal Company	WEVA 83-170

Commission Decisions

The following cases were Directed for Review during the month of February

Secretary of Labor, MSHA v. A. H. Smith Stone, Docket No. VA 81-51-M. (J
Koutras, December 30, 1981)

Secretary of Labor, MSHA v. Roy Glenn, Employed by Climax Molybdenum Co.,
Docket No. WEST 80-158-M. (Judge Morris, January 5, 1982)

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket No. PENN 8
(Judge Melick, January 18, 1982)

No cases were filed in which Review was Denied.

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 4, 1982

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. : Docket No. VA 80-84

EASTOVER MINING COMPANY

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). The withdrawal order issued in this case, Order 0682886, charges a violation of 30 C.F.R. § 75.507. This standard mirrors section 305(d) of the Mine Act which reads:

> Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air.

30 U.S.C. § 865(d). At the hearing before the Administrative Law Judge the parties stipulated:

> (6) The Pump control box, which is the subject of Order No. 0682886, was located in the last open crosscut of the Right Section, which is a return airway.
>
> (7) The subject pump control box did not have permissible power connection points at the time the subject order was issued.

The Administrative Law Judge found a violation and ordered payment of penalty. Although the judge found that the pump control box had not been energized, he reasoned that "whether or not the pump control box was ever energized is irrelevant to a determination of whether the regulation was violated." 2 FMSHRC at 3676.

We agree with the judge's conclusion that a violation was established. We do not, however, agree with his broad construction of the regulation in this case. The judge's construction of section 75.507 would lead to the result that a violation of section 75.507 always

when equipment is energized or can be energized. However, merely finding a power-connection point in return air does not necessarily absolve the operator simply because it is non-energized. In such cases, a violation may occur if the equipment has been, is about to be, could be, or habitually was, operated in return air. Cf. Solar Fuel Co., 3 FMSHRC 1384, 1385-86 (1981).

We now apply the preceding principles to the facts of this case, based on the record as developed below. There is no question that the pump control box was not energized when the inspector issued the order. The foreman who placed the equipment in the return air during the shift prior to the one during which the inspection occurred testified that there was not enough cable to connect the pump to the power center. He also testified that he was familiar with the regulation and would not have left the control box in the return air if it were energized.

In this case it is claimed that the unit was not in fact located in the return air but was simply placed there temporarily until it could be moved to intake air. In other words, it is contended that the location was merely an interrupted transit to another position where it would be located as required by the regulation.

Nevertheless, the record does not contain a satisfactory explanation of why the control box was left in the return air. Nor has Eastover completely dispelled our concern that the only reason the pump control box was not energized in return air was because the connecting cable was too short--a "problem" which unfortunately suggests an original intent to energize in return air and a possible intent to "remedy" the situation by means other than moving the control box into intake air. We will not, however, indulge in speculative hypotheses. The record before us does not allow us to say with assurance that Eastover clearly showed that the equipment could not or would not have been energized in return air. Our concern is underscored by the undisputed facts that the mine had a history of methane liberation (the major danger in the event of arcing) and .1 to .2 volume percent of methane was found at the working place when the order was issued.

For the foregoing reasons, we affirm the judge's conclusion that the standard was violated, on the basis articulated above.

Rosemary M. Collyer, Chairman

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February 5, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
on behalf of MICHAEL J. DUNMIRE and JAMES ESTLE	:	Docket Nos. WEST 80-313-D WEST 80-367-D
v.	:	
NORTHERN COAL COMPANY	:	

DECISION

This discrimination case requires us to define further the scope of the right to refuse work under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). The case also raises questions concerning appropriate remedies for miners who have suffered discrimination. The administrative law judge concluded that Northern Coal Company discriminatorily discharged two miners, in violation of section 105(c)(1) of the Mine Act, for engaging in a protected refusal to work. The judge assessed civil penalties and awarded backpay and other relief. 1/ For the reasons that follow, we affirm the judge's decision. 2/

I.

Many of the judge's essential factual findings are undisputed.

> crew at Northern's Rienau No. 2 underground coal
> ado, consisted of six miners, including shift
> and the alleged discriminatees, Michael Dunmire
> operated the continuous miner, which mines the
> ı support of Estle as a "miner's helper" respon-
> :t timbers and shoveling the ribs.

an area referred to as the slopes. 3/ Although, as discussed in section II below, the witnesses varied somewhat in their specific descriptions of roof (or "top") conditions in the slopes during the December-March period, the record amply supports the judge's finding (3 FMSHRC at 1333, 1336) that, in general, the roof was bad. Pieces of coal and rock of various sizes frequently fell from the roof during this period. The ribs were also sloughing.

On the evening of Wednesday, February 27, 1980, the day before the key events in this case, the swing shift crew was working in the No. 1 entry of the slopes. Material was falling from the roof and ribs, dust generated by operation of the continuous miner had reduced visibility to almost nothing, and ventilation was bad. We affirm the judge's finding that Estle became concerned about the bad air and the possibility of injury from a roof fall, and suggested to Foreman Morgan that they stop mining until the roof could be crossbarred and additional air found. 3 FMSHRC at 1333; Tr. 85-7. As discussed in the accompanying note, the record also shows that Morgan did not respond to Estle and that Dunmire also complained about the roof and air but was told by Morgan to keep working. 4/ Mining continued and no member of the crew refused to work.

3/ The area was called the slopes because the coal seam there sloped from side to side and also pitched downhill as entries were advanced.

4/ We deem it necessary to clarify the record concerning the events of February 27 because it appears that some confusion has arisen. In finding that Estle complained to Morgan on February 27, the judge cited, in part, to Tr. 73. That portion of the transcript, however, is part of Estle's testimony about a series of different safety complaints that occurred earlier. Those complaints culminated in an incident in which both Estle and Dunmire successively complained to Morgan about working under crumbling roof, and Morgan agreed to stop the mining only after some roof material fell on him as well. Tr. 73-5. Morgan's testimony corroborates Estle's account. Tr. 273-4. In addition, the evidence establishes that on Monday, February 25, the start of the work week, Morgan allowed Dunmire to stop shoveling ribs because of bad rib and roof conditions. Tr. 160, 242, 275. Concerning the events of February 27, Estle testified that Morgan did not respond to his complaint (Tr. 86-7), and Dunmire testified that he too complained about the roof and air but was told by Morgan to keep working. Tr. 158-9, 172. On cross-examination, Morgan conceded that he did not remember if Estle and Dunmire had complained on February 27. Tr. 275.

In light of the foregoing, we believe that at some time in advance of February 27, Morgan agreed to stop mining, and on February 25, allowed Dunmire to stop shoveling ribs, on both occasions due to dangerous conditions. Because Estle and Dunmire were treated by the judge as credible witnesses and because their believable testimony is mutually

number of occasions to Morgan and other Northern supervisors about bad roof and the dangers of working under unsupported roof. 5/

Shortly before the start of the Thursday, February 28 swing shift, Estle and Dunmire were separately informed by Charles Daniels, the general mine foreman, that they were being transferred from the Morgan crew--Estle possibly to electrical work and Dunmire to the non-production graveyard shift. Daniels told Estle that the decision had been made "higher up" and for the reasons, among other things, that management believed the swing shift crew was too "close-knit" and was not keeping up with its safety duties for roof and ventilation control. 2 FMSHRC at 1333; Tr. 90-3, 218-20. At the hearing, Daniels testified that Morgan had not been meeting his supervisory responsibilities in these safety areas. 3 FMSHRC at 1333; Tr. 218-20, 238. Both Estle and Dunmire were upset and angry over the transfer (Tr. 92, 170), and testified that they thought the reasons for the actions were their own safety complaints. Tr. 92-3, 160-1.

After meeting with Daniels, Estle and Dunmire went into the slopes area of the mine to begin working on the February 28 swing shift. After completing some breakthrough work in the No. 1 entry (where the swing shift crew had been working the night before), the Feburary 28 day shift crew had moved into the adjacent No. 2 entry and driven it in another 60 feet or so before their shift ended. The No. 1 and 2 entries were parallel, about 60 feet apart, and connected by crosscuts. 3 FMSHRC at 1338; Tr. 187, 262-4, 309-10; Exh. P-3 (left side of map, area labelled "Northeast Mains" (mining entries numbered from left to right)).

In the mine, immediately prior to beginning his shift, Estle talked with Rod Shaw, the continuous miner operator from the previous shift. Estle asked Shaw about the roof, and Shaw said it was "just as bad" as last night and was "blowing out." 6/ Shaw indicated--and Estle understood, that he was referring to the roof in the No. 2 entry where the day shift crew had just been working. 3 FMSHRC at 1333; Tr. 94-5.

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footnote 4/ continued
above (Tr. 158-9, 160, 172, 242, 275), which includes testimony from the two Northern supervisors involved. Dunmire emphatically testified that Morgan ignored his complaint on February 27. Tr. 158-9, 172. Dunmire's comment at Tr. 160 (relied on by Northern) that he was permitted to stop shoveling ribs "the night before" his discharge on February 28 appears to have been a loose reference to Monday, February 25; in his next answer he also referred to the date in question as "the first night" -- an apparent reference to the start of the work week. In any event, the testimony of Morgan and Daniels clearly dates this incident February 25. Tr. 242, 275.

5/ he judge correctly found, Dunmire had complained previously on [illegible] occasions about safety problems. 3 FMSHRC at 1333, 1335;

Stamler was located some distance from the face where the mining was take place.

Estle told the crew that he had talked with Shaw and that roof conditions were bad--as bad as they had been the night before. There was no response, and Morgan directed the crew to start work. Dunmire then said that he would not work as the miner's helper, but would be willing to shovel the conveyor's tail piece. Morgan replied that he lacked experienced employees to do the helper's work, and that Dunmir would have to be the helper. Morgan added that if Dunmire did not wa to do the helper's work, Dunmire knew what he could do. Estle joking interjected the explanation that Dunmire could get his bucket and go home. Morgan indicated that Estle was correct, and Dunmire left the work site. Estle told the crew that they should all leave with Dunmi Morgan responded that if Estle went out, he would "be cutting [his] c throat." 3 FMSHRC at 1333, 1337 n. 3; Tr. 261. 7/ No one left. Est who had a chronic lower back problem, told Morgan he was sick and the left the work site. 8/

The evidence shows that when Estle and Dunmire arrived on the surface several minutes later, they stopped off in the mine office wh Dunmire separately asked Daniels, the general mine foreman, and Rober Pobirk, the mine superintendent, if either wanted to talk with him. Each responded that he did not. Tr. 100, 164, 221-2, 285-6. Daniels testified that although he "assumed [Dunmire had] quit," he did "not want to say anything" to Dunmire because he felt "it was no use talki to him or having an argument with him." Tr. 222. 9/ Estle and Dunmi then went to the showers.

7/ Morgan first testified that he and Roy Petree, another member of the crew, made the "throat-cutting" remark, and, when asked to clarif his answer, then attributed the comment to Petree alone. Tr. 261. T judge credited Morgan's initial testimonial version that he himself h made such a remark. 3 FMSHRC at 1337 n. 3. At oral argument, Northe challenged this finding. The finding is a credibility resolution tha seems to us based on the judge's observation of Morgan's demeanor whi testifying. We will not ordinarily overturn such resolutions by the trial judge who observes the witnesses, and we affirm this one.

8/ Estle testified that "regardless" of the roof conditions, he pro bably would have left that day anyway due to his back problem. 3 FMS at 1334; Tr. 99. Estle saw a doctor the following day.

9/ Pobirk may not have realized exactly what was going on when Dunm first spoke with him. Tr. 285. Pobirk testified, however, that afte Dunmire left, Daniels "made [him] aware that [Estle and Dunmire] had

Pobirk told them that since they had walked off the job, they had quit. 3 FMSHRC at 1334; Tr. 100, 164-5, 222-4, 286, 291. Dunmire replied that he was not quitting or refusing to work, but was only refusing to be the miner's helper. Tr. 164. Dunmire also told Pobirk that he did not think the roof was safe and wanted the miner shut down while he set timbers, established ventilation, and shoveled the ribs. Tr. 164-5, 222-4, 291. Dunmire and Pobirk argued, and finally Pobirk stated that Dunmire was terminated. Tr. 165. 10/ Estle told Pobirk that he was sick and was going to the doctor. Tr. 102. Estle and Dunmire left the mine. On the following Monday, March 3, when Estle attempted to present his medical excuse to Troy Wills, Northern's area superintendant, Wills told him that Northern considered Estle's walk out to have been a quit.

About three weeks later, Estle returned to the mine and told Wills that he would drop the discrimination complaint that he had filed with MSHA if Northern would rehire him. Wills responded that Estle could not be rehired because if anyone else wanted to walk out, they could do it and get away with it.

II.

We analyze first the central issue of whether Estle and Dunmire were unlawfully discharged for engaging in a protected refusal to work. We recognized in general terms the right to refuse work under section 105(c)(1) of the Mine Act in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and further developed the scope of the right in Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). We preface our analysis by briefly summarizing this area of law, particularly in light of the Third Circuit's Consolidation Coal decision. 11/

Under Pasula and Robinette, a miner may refuse to work if he has a good faith, reasonable belief that a hazardous condition exists. A miner's refusal may extend to "affirmative self-help", such as shutting off or adjusting equipment, so long as the self help is reasonable as well. Pasula, 2 FMSHRC at 2789-94; Robinette, 3 FMSHRC at 807-17. As we have previously indicated (Phelps Dodge Corp., 3 FMSHRC 2508, 2508 n. 1 (1981)), the court of appeals reversed Pasula solely on evidentiary grounds, holding that the miner in question had been discharged for engaging in unprotected activity. Consolidation Coal, 663 F.2d at 1216-21. We do not think that the Third Circuit's Consolidation Coal decision is inconsistent with our general holdings in Pasula and Robinette. On the contrary, we read the court's opinion as a cautious approval of the main outlines of the right to refuse work as developed in our decisions.

10/ Daniels and Pobirk denied that Pobirk told Dunmire that he was

whether the miner was fired for unprotected activity for there cou
have been no claim that he was fired for protected activity. The
prefaced its evidentiary analysis by stating that it "found it unn
sary to define the perimeters of [the] right [to refuse work] unde
Mine Act." 663 F.2d at 1216 (emphasis added). The court's discus
of the right, in the detailed footnote (Id. at 1216-17) that accom
the passage just quoted, makes clear that it agreed there was such
right in general, but did not deem it necessary to define the spec
of the right:

> Thus, although we need not address the extent of such a
> the statutory scheme, in conjunction with the legislative his
> of the 1977 Mine Act, supports a right to refuse work in the
> that the miner possesses a reasonable, good faith belief that
> specific working conditions or practices threaten his safety
> health.

Id. at 1217 n. 6.

We note that the court's discussion of the right accords with
Robinette's holding that a work refusal must be premised on a good
faith, reasonable belief in a hazard--the chief areas of contentio
the present case. Indeed, in approving our refusal in Pasula to d
to an arbitral decision regarding the miner's discharge (2 FMSHRC
2794-96), the court described reasonable, good faith belief in muc
same manner as our Robinette decision (3 FMSHRC at 809-12):

> In this case, the considerations underlying the standard
> gravity of injury in the Wage Agreement [between the operator
> miners' representative] and in the statute are different. Th
> Agreement requires the arbitrator to determine whether the ha
> was abnormal and whether there was imminent danger likely to
> death or serious physical harm. The underlying concern of the
> Act, however, is not only the question of how dangerous the c
> tion is, but also the general policy of anti-retaliation (aga
> the employee by the employer). Because this is a major conce
> the Mine Act, it requires proof merely that the miner reasona
> believed that he confronted a threat to his safety or health.
> Those who honestly believe that they are encountering a dange
> their health are thereby assured protection from retaliation
> employer even if the evidence ultimately shows that the condi
> were not as serious or as hazardous as believed. Questions c
> imminence and degree of injury bear more directly on the sinc
> and reasonableness of the miner's belief.

663 F.2d at 1219. 12/ We now apply the general principles control
the right to refuse work to the issues in this case.

refusal to work on February 28 and that their terminations over the incident therefore violated section 105(c)(1) of the Mine Act. On review, Northern raises three major objections to the judge's conclusion: (1) that a miner must ordinarily state a safety or health complaint in order to bring a work refusal within the protection of the Mine Act, and that Estle and Dunmire failed to articulate such complaints; (2) that the work refusal of Estle and Dunmire was per se unreasonable because they failed to examine the work area that was the subject of their refusal; and (3) that in any event the mining conditions in question were not unsafe. Although Northern conceded at oral argument that Estle and Dunmire "probably" had a "subjective good faith belief of [a] danger" (Tr. Arg. 14), a number of the arguments in Northern's brief touch on good faith issues, and we therefore briefly address that subject as well.

We note at the outset that this is not a "mixed motivation" discrimination case where the evidence shows that the operator's adverse action was motivated both by the miner's protected activity and also by his separate unprotected conduct. Northern states that it terminated Estle and Dunmire solely for having "walked off their jobs," an action Northern "took as a quit on their part." Br. 3. Therefore, the only

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fn. 12/ cont'd.
terminated him in any event for this latter conduct alone. Under the discrimination analysis we developed in Pasula, these findings entitled the miner to relief. 2 FMSHRC at 2796-801. The court disagreed with our evidentiary determinations, and found that the "real" reason the miner was terminated was for shutting down the equipment and "refus[ing] to permit anyone else to operate it." 663 F.2d at 1219-21. The court concluded that this conduct was beyond the pale of the right to refuse work, and that the miner was therefore lawfully discharged for the conduct:

> There is no right in the [Mine] Act to shut down an entire shift's work. An individual is protected by the Act from retaliation for asserting and acting on his real fear that conditions are unsafe or hazardous to his health; but no one has the right to stop others from proceeding to work if they so wish.

Id. at 1219.

We do not regard the court's disposition of the discrimination issue as a holding that a miner may never engage in affirmative self help such as shutting off or adjusting equipment. The court obviously believed that the miner's actions were unreasonable and excessive. Robinette stressed that any affirmative self help must be reasonable. 3 FMSHRC at 812. Given the court's own emphasis on reasonableness, we

Statement of a health or safety complaint

We conclude that substantial evidence supports the judge's finding that safety complaints were in fact made, but we find it necessary to elucidate his treatment of the issue. Because the evidence surrounding these complaints is controverted and because the subject is important, we also address Northern's general argument that such complaints must be made. 13/ The judge concluded that a statement of a complaint is a prerequisite to a valid work refusal (3 FMSHRC at 1335) and, in his brief to us, the Secretary concurs. Br. 16.

A complaint requirement accords with Robinette's emphasis that a work refusal must be premised on a good faith, reasonable belief in a hazard, and is also consistent with sound safety practices and common sense. As we noted in both Pasula and Robinette, Congress intended to extend the right to refuse work under the Mine Act to "workers acting in good faith ... as responsible human beings." 14/ In our view, it would not be the conduct of a "responsible human being" to walk off the job and, for no good reason, fail to inform anyone of a possible hazard that could imperil safety or health. We agree with Northern that stating such a complaint may permit the operator to correct the condition in a timely fashion and may protect others in the mine from harm. On the other hand, we made clear in Robinette that we will not adopt complicated work refusal doctrines that may be difficult to apply in practice or that could chill the right to refuse work. 3 FMSHRC at 810 n. 12. Balancing all the foregoing considerations, we therefore adopt the following requirement.

Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

13/ In Pasula, we solicited the "considered views" of the Secretary, miners, miners' representatives, and operators on "how [the right to refuse work] should be shaped." 2 FMSHRC at 2793. We thank Northern's counsel for their helpful discussion of the complaint issue in their brief and at oral argument.

14/ Pasula, 2 FMSHRC at 2792, and Robinette, 3 FMSHRC at 809 & n. 11, quoting S. Rep. No. 95-181, 95th Cong., 1st Sess. 35 (June 21, 1977), reprinted in

behalf of all concerned, even if not announced in such terms. As the judge correctly observed (3 FMSHRC at 1337), the Mine Act secures the right to concerted protected activity: section 105(c)(1) provides that a miner is protected in the "exercise ... on behalf of himself or others of any statutory right afforded by this Act" (emphasis added).

We stress that our purpose is promoting safety, and we will evaluate communication issues in a common sense, not legalistic, manner. Simple, brief communication will suffice, and the "communication" can involve speech, action, gesture, or tying in with others' comments. We are confident that the vast majority of miners are responsible and will communicate such concerns in any event. In short, we believe that the practical effect of this rule will be to assist in weeding out work refusals infected by bad faith--conduct that enjoys no protection under the Mine Act. We now apply these standards to the facts of this case. 15/

We conclude that the evidence summarized in the first part of this decision shows that Estle and Dunmire stated safety complaints both at the Stamler, before their work refusals, and at the mine office after they had left the work area. At the Stamler, Estle informed the entire swing shift crew, including Morgan, that he had just talked with a continuous miner operator from the day shift and had been informed that roof conditions were bad--as bad as they had been during the previous night's swing shift. In our opinion, the plain meaning of these words would convey to any reasonable miner--if not any reasonable person, a complaint concerning the roof under which the crew was about to work.

15/ The judge, Northern, and the Secretary all cited our decision in Deskins Branch Coal Co., 2 FMSHRC 2803 (1980), as support for the proposition that a miner must state a safety or health complaint in connection with a work refusal. For purposes of clarity, we note that Deskins does not mandate the result reached in the present case. Deskins arose under the 1969 Coal Act, and involved only the right under section 110(b) of that Act to "notif[y] the Secretary or his authorized representative of any alleged violation or danger." In Deskins we concluded that stating a safety complaint to an appropriate individual (whether a representative of the operator or Secretary), was the essence of the "right to notify," and that failure to make such a communication would remove the miner from the protection of section 110(b) of the 1969 Coal Act. 2 FMSHRC at 2803-4. What was required for a valid notification of the Secretary under the 1969 Coal Act does not necessarily determine what is required for a valid work refusal under the Mine Act. While there are similarities between section 110(b) of the 1969 Coal Act and section 105(c)(1) of the Mine Act, the latter section expanded the list of protected activities and was intended by Congress to be inter-

night before, must have [illegible]

While we agree with the judge that under section 105(c)(1), Estle's statement (3 FMSHRC at 1337) may be deemed a concerted complaint on behalf of the rest of the crew, including Dunmire, we also conclude that Dunmire himself complained at the Stamler. Only a minute or so after Estle mentioned the bad roof, Dunmire told Morgan he would not work as the miner's helper, although he was willing to perform other tasks. We are satisfied that this was a readily understandable followup to Estle's statement. Dunmire meant that since the roof was bad, he preferred not to work under it. We agree with the judge (3 FMSHRC at 1335) that Morgan must have understood Dunmire, especially since Dunmire had voiced the same concern to him the night before, as well as on other occasions. We think that the judge's statement that Dunmire made no complaint to Morgan (Id.) should not be read literally or in isolation. It seems to us that the judge merely meant that Dunmire's words, while if judged standing alone might not appear to be a complaint, constitute an understandable complaint when examined in context--including the normal flow of conversation.

There is no dispute that not long after leaving the Stamler, Dunmire (with whom Estle was standing) made it quite clear to Pobirk that they were complaining over roof conditions. Even were we to share Northern's view of the evidence regarding the events at the Stamler, this conversation would qualify under the standards announced in this decision as a complaint by Dunmire (on behalf of himself and Estle) made reasonably close in time to a work refusal.

In sum, we conclude that, where reasonably possible, miners should ordinarily communicate their safety or health complaints in connection with a work refusal, and that the evidence shows that Estle and Dunmire did so.

Good faith

Northern's concession at oral argument that Estle and Dunmire "probably" had a good faith belief in a danger undercuts the suggestion in Northern's brief that they lacked good faith belief. When the judge's findings are viewed as a whole, it is clear that he found Estle and Dunmire credible witnesses who had acted out of a good faith fear o dangerous conditions. Although we agree with Northern that the two miners were also unhappy about their imminent transfer, we do not regar that as sufficient evidence that they acted in bad faith. Their respec histories of concern over roof conditions persuade us of their sincerit on February 28.

[illegible] Northern's argument that prior complaints cannot be [illegible] Such history

motivations for leaving the mine. We agree with the judge (3 FMSHRC at 1337 & n. 2) that Estle testified (Tr. 99, 107, 123) that he had left the mine partly because of safety concerns and partly because of his back problem, although he mentioned only the back problem when he told Morgan he was leaving. As discussed above (pp. 2-3 & n. 4 above), Morgan had ignored Estle's safety complaint just the night before, and we regard as credible Estle's explanation (Tr. 126) that he did not wish to pursue a safety complaint any further with Morgan. Estle's reluctance is perhaps even more understandable in light of Morgan's immediately preceding admonition that Estle would be "cutting his throat" if he left in support of Dunmire. Of course, as the judge and we have found, and as Estle himself also explained (Tr. 123), Estle had articulated a general safety complaint only minutes before leaving. We deem that complaint sufficient indication of his good faith reason for leaving. 17/

Reasonable belief

There is no dispute that before leaving, Estle and Dunmire did not personally examine the work area that was the subject of their concern. The judge found that "[i]t [was] not necessary to make such an examination" where the miners otherwise possessed a reasonable basis for belief in a danger. 3 FMSHRC at 1336. Northern urges us to adopt a per se rule that failure to examine ordinarily removes a work refusal from the Mine Act's protection. Br. 22-4. We do not regard a per se approach as appropriate in this area, but agree that the matter of personal examination may be relevant to a miner's good faith, reasonable belief. We think that personal examination should be one of the many possible surrounding circumstances that should be considered on a case-by-case basis in evaluating the validity of work refusals. Certainly, we decline adopting any approach that would require miners to expose themselves directly to hazards, because avoidance of injury is the very reason the right to refuse work exists. For purposes of resolving this case, we re-emphasize our rule that a miner's belief must be reasonable, and hold that miners may rely on such indications of conditions as seemingly trustworthy reports from others and earlier conditions in the mine.

17/ Since we agree with the judge that Estle was partially motivated by safety concerns, we view Estle's additional reliance on his back problem as largely irrelevant. Northern introduced no evidence rebutting his medical excuse, and nothing about the right to refuse work precludes a miner from also relying on non-safety related reasons for his actions, particularly where, as here, the miner is seemingly threatened with termination if he acts on safety related grounds alone. Finally, although Northern does correctly point out that at one point in cross-examination Estle testified he left because of his "anger" and "tail-

where the swing shift was about to work were bad--as bad as they had been on February 27. Both Estle and Dunmire had been concerned over the roof on February 27, and had complained to no effect. They had been observing, and complaining about, bad roof conditions in the slopes for the previous several months. We agree with the judge (3 FMSHRC at 1336) that the combination of a first-hand report from another miner and their own immediately preceding first-hand experience supplied an acceptable basis for a reasonable belief in hazardous conditions. Thus, we cannot agree that this is a case where a failure to examine reveals either bad faith or lack of reasonable belief. 18/

Moreover, we are satisfied, as was the judge, that the miners' belief in dangerous conditions was quite reasonable. There is a great deal of credible evidence that roof and rib conditions in the slopes had been bad for some time, with considerable falling, "flaking," and "blowing out" of coal and rock, and were bad on February 27 and 28. We affirm and incorporate by reference the judge's thorough analysis of this evidence (3 FMSHRC at 1333, 1336, 1338), and comment only on a few salient aspects of the evidence.

While there were differences among the witness' description of mining conditions (and while we suspect the truth lies somewhere between the most extreme accounts), virtually all the witnesses agreed that there were roof fall and rib sloughing problems in the slopes. For example, as the judge pointed out, Northern's own witness Daniels, the general mine foreman, described the roof in the No. 2 entry where the swing shift was to work on February 28 as only "fair" (Tr. 223). At another point, Daniels conceded that the slopes top was, at times, "bad" (Tr. 241), and finally stated that the Rienau mine only "got out of ... bad [roof] condition around the middle of March" (Tr. 250), some weeks after Estle's and Dunmire's work refusal. As we found above (pp. 2-3 & n. 4), Morgan, not long before the crucial events in this case, had also excused Estle and Dunmire from work when roof and rib conditions were particularly dangerous. Most tellingly, Gene Moore, a miner on the day

18/ In its brief, Northern too narrowly interprets our use of the word, "perception" in our discussion of reasonable belief in Robinette. Br. 21, 23. In Robinette, we used "perception" in its general sense as a synonym for belief, not in its more narrow sense as referring to a direct sensory impression. 3 FMSHRC at 812. We did not mean to suggest that a miner must necessarily become aware of an apparent danger through his own sensory impressions; we meant only that his belief of a danger must be reasonable, regardless of how he arrived at his belief. Of course, often the miner's own direct observations will supply the basis of his belief in a hazard. Our intent is to suggest that, just as is

were scheduled to work. 3 FMSHRC at 1338; Tr. 187-90. 19/ As we pointed out in Robinette (3 FMSHRC at 812), a miner's reasonable belief can be established through the kind of corroborative evidence present here.

Thus, we agree with the judge that Estle and Dunmire had a good faith reasonable belief in a roof hazard on February 28. While perhaps Northern demonstrates that other reasonable reactions were possible on February 28, we stress that, because reasonable minds can differ, our Robinette test requires only a reasonable belief. 3 FMSHRC at 811-12 & n. 15. We also think that their reasonable belief is reflected by the reasonableness of certain aspects of Dunmire's conduct on February 28. Dunmire offered to Morgan to perform alternative work. As noted above (p. 4), Dunmire attempted to talk with Daniels and Pobirk when he arrived at the surface but was initially rebuffed. Dunmire later informed Pobirk that he was not quitting, but only refusing to work under bad roof, and made clear he would work if the roof problems were resolved. The evidence shows that Estle was acting in support of his co-worker. This is not the behavior of individuals acting on bad faith or reckless impulse.

In short, we conclude that Estle and Dunmire engaged in a protected work refusal. Because they were fired for this work refusal, the terminations violated section 105(c)(1) of the Mine Act. We now turn to the remaining issues in the case.

III.

There are three remaining issues: (1) whether the judge erred by refusing to consolidate an immediate hearing on the merits with Dunmire' temporary reinstatement hearing and whether the limited scope of the temporary reinstatement hearing comported with due process requirements; (2) whether the judge erroneously included vacation pay and hearing expenses in the back pay award for Estle and Dunmire; and (3) whether the judge erroneously calculated back pay on the basis of an incorrect back pay period for Estle. Northern has not complained about the judge' imposition of civil penalties, and therefore no penalty issue is before us.

19/ Northern correctly observes that on February 28, the swing shift crew worked in the No. 2 entry of the slopes, a different location from the No. 1 entry where they had worked the previous night. Northern argues that therefore Estle and Dunmire, absent examination, could not have had a basis for a reasonable belief in bad conditions in the new work area. However, the two parallel entries were located in the same general area of the slopes where roof and rib problems had been the

rsuant to section 105(c)(2) of the Mine Act, which implemented that section. 20/
le 44, 29 C.F.R. § 2700.44 (1981),

20/ Section 105(c)(2) of the Mine Act provides in relevant part:

Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [section 105(c)] may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

Our former Rule 44 provided:

(a) Contents of application procedure: hearing. An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the

application for Dunmire's interim reinstatement pursuant to section 105(c)(2) and our Rule 44, issued an order temporarily reinstating Dunmire. On May 30, 1980, Northern requested a hearing on the reinstatement order. The parties agreed to have the hearing held on June 6, 1980. The order directing the hearing indicated that the scope of the hearing would be controlled by the terms of Rule 44(a). On June 5, 1980, Northern moved for consolidation of a hearing on the merits with the hearing on the temporary reinstatement order, or in the alternative, for expedition of the hearing on the merits.

The hearing on the temporary reinstatement order was held, as scheduled, on June 6, before the same judge who decided this case on the merits, and Northern renewed its consolidation/expedition motion. Tr. 8-9. The judge denied the request for immediate consolidation on the grounds that at that time the issues had not been framed and the Secretary's complaint on the merits had not been filed. Tr. 12. The judge agreed, however, to expedite proceedings, and set the hearing on the merits for July 24, 1981. Id. The judge also indicated that although the merits of Dunmire's discrimination case were beyond the scope of the temporary reinstatement hearing, evidence concerning the factual bases relied upon by the Secretary in applying for Dunmire's reinstatement would be relevant. 3 FMSHRC at 1341; Tr. 18-22.

Objecting to the scope of the hearing, Northern waived its right to proceed with it and requested that the parties "simply proceed" with the expedited July 24 hearing on the merits. Tr. 22-3. The judge granted Northern's request. Tr. 23. Northern indicated that it wished to preserve its due process objections concerning the temporary reinstatement hearing procedure. Tr. 25. The hearing on the merits took place as scheduled, and subsequent to the hearing, Dunmire voluntarily left Northern's employ. Permanent reinstatement for Dunmire was therefore neither sought nor ordered. 3 FMSHRC at 1341.

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fn. 20/ cont'd.

(b) Dissolution of order. If, following an order of reinstatement, the Secretary determines that the provisions of section 105(c)(1) have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. I the Secretary fails to file a complaint within 90 days, the Judge may issue an order to show cause why the order of reinstatement should not be dissolved. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in hi own behalf under section 105(c)(3) of the Act and § 2700.40 of these rules.

operators of the due process [illegible] Carbon Corp., 3 FMSHRC 1707, 1711-12 (1981). We have since promulgated a new Interim Rule 44 designed to cure the deficiencies of our former procedure. 21/

While Northern has not abandoned its due process objections, we conclude that our disposition of the discrimination question and the combination of events summarized above have mooted these issues. Pursuant to Kentucky Carbon, we vacate the order of temporary reinstatement on the grounds that the hearing provided Northern was conducted under a procedure we have deemed legally inadequate. However, as in Kentucky Carbon (3 FMSHRC at 1712), we do not remand for any further proceedings because there is no need or reason for continuing interim relief. In the first place, we have determined that Dunmire was discriminatorily discharged--a conclusion that means he was entitled to temporary reinstatement. Furthermore, he has since left Northern's employ, and thus his reinstatement is not before us. Our vacation of the temporary reinstatement order makes it unnecessary to resolve Northern's due process arguments regarding consolidation and the proper scope of hearings, and we reserve consideration of such issues to a case presenting a live controversy under our revised procedure. 22/

21/ We have amended only subsection (a) of Rule 44. The new language provides:

§ 2700.44 Temporary reinstatement proceedings.

(a) Contents of application; procedure; hearing. An application for temporary reinstatement shall state the Secretary's finding that the miner's complaint of discrimination, discharge or interference was not frivolously brought and shall b accompanied by a copy of the miner's complaint, an affidavit setting forth the Secretary's reasons for his finding, and proof service upon the operator. The application and accompanying documents shall be examined upon an expedited basis, and, if it appears that the Secretary's finding is supported by the application and accompanying documents, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon receipt or actual notice. If the person against whom relief is sought requests a hearing on the order, a Judge shall within 5 days after the request is filed, hold a hearing t determine whether the miner's complaint of discrimination, discharge or interference was frivolously brought. The judge may t dissolve, modify or continue the order.

46 Fed. Reg. 39,137-38 (July 31, 1981).

22/ We note in passing that, despite our disposition of this issue, seriously doubt whether Northern preserved its right to complain on discretionary review about the scope of the temporary reinstatement discussed above, Northern waived its right to proceed w

Section 105(c)(2) of the Mine Act empowers the Commission to reme discrimination by "such affirmative action to abate the violation as t Commission deems appropriate, including, but not limited to, the rehir or reinstatement of the miner to his former position with back pay and interest." As we recently held, this broad remedial charge was design not only to deter illegal retaliation but also to restore the employee as nearly as possible, to the situation he would have occupied but for the discrimination. Kentucky Carbon Corp., 4 FMSHRC ____ (No. KENT 80 145-D, January 6, 1982), slip op. at 2.

As we also pointed out in Kentucky Carbon, the Mine Act's provisions are modeled largely on section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(c). Id., slip op. at 2 & n 4. In applying that section's provision for back pay awards, the Nati Labor Relations Board and the courts have long treated back pay as a term of art encompassing not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral part of an employer's overall wage-benefit package. See, for example, NLRB v. Strong, 393 U.S. 357, 358-60 & n. 4 (1968); NLRB v. Rice Lake Cream Co., 365 F.2d 888, 892 (D.C. Cir. 1966). In general, we believe that the same approach to back pay applies under the Mine Act. We also are of the view that so long as our remedial orders effectuate the purpose of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances. See Glenn Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463, 3464 (1980) (analogous approach with regard to relief under the 1969 Coal Act). Cf. NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969)(expla ing the NLRB's discretionary powers under section 10(c) of the NLRA). As the judge correctly determined (3 FMSHRC at 1343), the Mine Act's legislative history removes any doubt on these points:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of t discrimination. The specified relief is only illustrative. Thus for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting notices by the operator.

S. Rep. No. 95-181, above, 37, reprinted in Leg. Hist. 625. In light the foregoing principles, we affirm the judge's back pay award of vacation pay and hearing expenses.

back pay award. 3 FMSHRC at 1342. Northern argues that because its policies prohibit employees from taking vacation pay in lieu of time off and because the two miners were paid back pay for the days in issue, the award constitutes a form of "double dipping." (Northern does not argue that, as a general matter, vacation pay may not be part of a back pay award).

Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations. We hold that, in general, vacation pay may constitute part of a back pay award. The discriminatees in this case had earned a right to both vacation time and vacation pay and while we cannot turn back the clock to give them the lost vacation days, we can, and do, assign a value to what they lost. The award of vacation pay is intended to compensate them not only for the accrued vacation pay, but also for the vacations that they lost. Hence, we do not regard the award as a form of "double dipping," and we would also reject any suggestion that time off following a discriminatory discharge may be deemed the equivalent of a vacation. Within the framework of providing just compensation, however, we endeavor to make our awards as reasonable as possible. We therefore modify the judge's award to give Northern the option, in the event Estle accepts (or has accepted) reinstatement, either (1) to pay the compensatory vacation pay as ordered by the judge, or (2) immediately to offer Estle the opportunity to take his last week's paid vacation after reinstatement (in addition to the paid vacation time he otherwise accrues). Estle may accept either method of compensation. The second option would give Estle back his paid vacation and also avoid concurrent payment of regular wages and vacation pay. Because Dunmire has left Northern's employ, this additional option is unavailable and Northern is directed to pay him the vacation pay ordered by the judge; the same applies if Estle declines reinstatement or has also left Northern's employ since reinstatement.

Regarding incidental, personal hearing expenses incurred by Estle and Dunmire in connection with their attendance, Northern argues that because section 105(c)(3) of the Mine Act expressly provides for hearing expenses, 23/ while section 105(c)(2) does not mention the subject, Congress must have intended that such expenses were outside the scope of a section 105(c)(2) remedial award. We agree with the judge that the differences in language between the two sections are not as significant as Northern argues. Section 105(c)(2) expressly provides that

23/ Section 105(c)(3) establishes procedures under which a miner may prosecute a discrimination case in the event that the Secretary declines to file a complaint on his behalf. In addition to authorizing back pay

remedial relief.

Finally, Northern objects to the back pay period used by the judge in calculating Estle's back pay. The judge found that Estle's back pay period extended from his loss of employment through to his reinstatement, less net interim earnings from a job he obtained with another employer on April 15, 1980. Northern argues that Estle is tied to the Secretary's pleadings, which sought back pay only to his resumption of full employment with another employer (that is, seemingly until April 13, 1980). We affirm and incorporate by reference the judge's thorough and scholarly analysis of this issue. 3 FMSHRC at 1343-45.

We observe only that, as the judge indicated, back pay is ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings. See, for example, OCAW v. NLRB, 547 F.2d 598, 602 (D.C. Cir. 1976). While back pay may be reduced in appropriate circumstances where an employee incurs a "willful loss of earnings" (fails to mitigate damages) (OCAW v. NLRB, 547 F.2d at 602-3), we are satisfied that Estle made reasonable efforts to mitigate his loss of income. He unsuccessfully sought rehire from Northern (p. 5 above); he was not required under the Mine Act to seek temporary reinstatement; and, in fact, he found employment in a reasonably short time. We also agree with the judge's refusal to exalt form over substance in holding that Estle was not responsible for, and was not necessarily limited by, the relief sought in the pleadings. Cf. Rule 54(c), Federal Rules of Civil Procedure. Our concern is to make miners whole, and technical problems in the pleadings can fairly be cured, as they were here, at trial.

For the foregoing reasons, we vacate the order of temporary reinstatement for Dunmire and, on the basis articulated herein, affirm the judge's decision in all other respects. The vacation pay award is modified as discussed above.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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February 16, 1982

SECRETARY OF LABOR,	:	Docket Nos. CENT 79-27-M
MINE SAFETY AND HEALTH	:	CENT 79-28-M
ADMINISTRATION (MSHA)	:	CENT 79-206-M
	:	CENT 79-207-M
v.	:	CENT 79-208-M
	:	CENT 79-332-M
HOMESTAKE MINING COMPANY	:	CENT 80-167-M

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), and involves alleged violations of mandatory safety standards. The administrative law judge found that the operator had not violated 30 C.F.R. § 57.12-82 and vacated the underlying citations. However, he found violations of other safety standards and assessed penalties. 1 The Secretary of Labor and Homestake Mining Company filed petitions for discretionary review which we granted. For the reasons that follow, we affirm the judge.

I.

The first series of citations alleges violations of 30 C.F.R. § 57.12-82. That standard provides:

> Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines.

1/ The judge's decision is reported at 2 FMSHRC 2295 (1980).

or telephone lines. They also agreed that there was no insulation between the outer jacket of the cables and the metal lines. Three types of power cables are involved here: one has three conductors individually insulated with polyethylene, wrapped in filler and covered with polyvinyl chloride jacketing; another has three conductors individually insulated with polyvinyl chloride, filler, and polyvinyl chloride jacketing; and the third has two conductors individually insulated with polyvinyl chloride and one bare ground wire, all separated from one another and suspended in polyvinyl chloride which forms the jacketing. All the cables are rated by the manufacturer at 600 volts, but normally carry only 110 volts at Homestake. 2/

The judge offered alternative reasons for holding the standard had not been violated. He first found that these insulated and jacketed power cables are not "powerlines" under the standard. That term, the judge held, refers to single conductor wires, which are usually exposed (such as trolley wires). The judge then found that, even if these power cables are "powerlines" subject to 30 C.F.R. § 57.12-82, they are insulated in compliance with that standard. The judge looked to the definition of insulated in section 57.2 and found the cables were "insulated in a manner suitable for the conditions to which they were subjected." 2 FMSHRC 2306. He stated that the polyvinyl chloride insulation protects the cables from physical abuse, as does the jacketing of the same substance on all three cables. Id. He noted that all the cables are insulated by the manufacturer to "withstand ... more than three times the voltage that actually passes through them" and that the jacketing is "tough". Id. The judge also concluded, "[T]he plain language of the standard does not require Respondent to provide additional insulation." 2 FMSHRC 2307.

The parties argue extensively about the precise definition of "powerlines." Expert testimony in this case reveals that the term "powerline" is not commonly used as a term of art by those trained in electricity, and does not have a modern technical meaning. Nor does either party convincingly demonstrate a common usage of the term. 3/ We believe this case can be resolved, however, by focusing on the purpose of the standard without an exhaustive analysis of the meaning of the term "powerlines". The cables in this mine contain conductors that transmit electricity, and thus can be considered powerlines; therefore, the standard applies to them.

2/ The manufacturer's insulation rating is the amount of current a manufacturer guarantees can be run through a cable without damage to the cable.

3/ Further, as another administrative law judge has stated, "Trying

telephone lines. It follows that the standard seeks to protect miners from the hazard of electrical shock and electrocution resulting from contact with an energized air or water pipe, or telephone line. The question in this case, then, is whether the power cables involved, which transmit electric current, were so insulated as to prevent the energizing of potentially electrically conductive metal pipes, air or telephone lines.

The standard at 30 C.F.R. § 57.2 provides:

> "Insulated" means separated from other conducting surfaces by a dielectric substance permanently offering a high resistance to the passage of current and to disruptive discharge through the substance. When any substance is said to be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected. Otherwise, it is, within the purpose of this definition, uninsulated. Insulating covering is one means for making the conductor insulated.

In arguing that these power cables are not sufficiently insulated, the Secretary relies on an interpretive memo concerning section 57.12-82 issued on February 21, 1975, by the then Assistant Administrator for Metal and Nonmetal Mine Health and Safety. This memo stated in part:

> Jacketing as provided on a powerline by the manufacturer is not adequate for the insulating purposes of Federal mandatory standard 55, 56, 57.12-82. Additional insulation or separation must be provided.
>
> * * * * * *
>
> Additional insulation means that insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum applied voltage on the conductor. [4/]

The amount of additional insulation that would be required by this memo is not only minimal but, in terms of the power transmitted and dielectric resistance, essentially meaningless. The power cables involved in this case would be required to have additional polyvinyl chloride insulation approximately 1/3 mil (1/3000 inch) thick. 5/ Moreover, the interpretive memorandum imposes a blanket requirement that additional insulation be placed between power cables and metal pipelines, regardless of the cable's existing insulation, dielectric strength, the conditions under which the cable is to be used, or the composition or design of the cable and its insulation. We recognize

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4/ The dielectric strength or resistance of a substance is the ability of that substance to resist the passage of electricity through

added where power cables and pipelines meet. We fail to see, however, how this superficial examination bears any relationship to the purpose of the standard. Rather, in order to make a bona fide determination that insulation adequate to prevent the transmission of current to adjacent pipelines is present, the adequacy of the added insulation must be evaluated, and this determination must be based on the objectively determinable character of the powerline and the existing insulation. In order to achieve the purpose of the standard, enforcement should not turn on the subjective evaluation of an inspector, without the objective evaluation of whether a hazard is or may be present. Further, section 57.12-82 does not state that "additional insulation" must be placed between "powerlines" and pipelines; it merely requires separation or insulation. 6/

Thus, we reject the Secretary's interpretive memorandum. The regulation does not require "additional" insulation, the amount of additional insulation required by the interpretive memorandum is, as we have noted, so minimal as to be not only essentially meaningless, but such as to engender a false and possibly hazardous sense of security The purpose of the standard, as written, can more accurately be achieved by an examination of the suitability of the insulation that is present at crossover points where water, telephone or air lines are in proximity to powerlines.

Accordingly, the insulation on the cables here involved at the points where they contacted pipelines must be examined to determine whether section 57.12-82 has been violated. The definition of "insulate in section 57.2 includes a requirement that the insulation be "suitable for the conditions to which it is subjected." The judge noted the cables in this case are insulated to withstand more than three times the voltage that passes through them. In addition, he noted that the jacketing, which also has insulating qualities, is "tough" and that unchallenged manufacturer's specifications sheets "contain impressive claims of resistance to abuse." 2 FMSHRC 2306. The Secretary did not rebut Homestake's evidence. The judge concluded, "The insulation and the jacket are sufficient to protect the cables against normal hazards in the Homestake Mine." Id. The judge's findings are supported by substantial evidence and are therefore affirmed.

6/ If the Secretary intended to require that a particular kind or amount of insulation be added to that supplied by the manufacturer, he has that authority and could have so stated in the regulation, and can do so now through rulemaking. Indeed, we strongly suggest that he do so--and promptly.

This portion of Homestake involves three violations of mandatory safety standards. The administrative law judge found that Homestake violated these standards. For the reasons that follow, we affirm the judge.

Citation No. 328789

On November 15, 1978, an MSHA inspector cited Homestake for an alleged violation of 30 C.F.R. § 57.3-22. This mandatory standard provides in part:

> Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter.... Loose ground shall be taken down or adequately supported before any other work is done....

The facts underlying this citation are disputed. The inspector testified that he noticed two miners slushing or preparing to slush muck on a slusher machine located outside and immediately opposite the entrance to the stope. The inspector also testified that he observed two miners inside the stope. Homestake admitted the existence of the loose rock. However, Homestake asserted in defense that the presence of a muck pile at the entrance to the stope created a more dangerous situation. It argued that the miners would have had to climb onto the dangerous muck pile in order to bar down the rock. It asserted also that its miners did not go inside the stope.

The judge rejected Homestake's defense. The judge noted that in MSHA v. Asarco, 2 FMSHRC 920, 924 (1980), another administrative law judge held that "miners are not required to bar down while standing on a muck pile." The judge found that the facts in Asarco were distinguishable from the facts here. He held that Homestake's failure to establish the size and location of the muck pile failed to bring the facts within the Asarco decision. Accordingly, the judge found that Homestake had violated the standard and assessed a penalty.

Before us, Homestake again argues that compliance is not required where checking for loose rock would itself create a hazard, and also that the judge erred in finding that the muck pile did not create a hazard. We reject both arguments. Assuming that Asarco establishes a permissible defense to the violation at issue, we concur with the judge's finding that Homestake failed to prove the defense. We note that the testimony of Homestake's witness was ambiguous; he did not expressly state that barring down loose rock required him to climb on top of a dangerous muck pile. By contrast, the inspector explicitly denied that he saw a muck pile constituting a hazard; nor had other miners mentioned the presence of dangerous conditions. The judge credited the inspector's testimony over that of the operator

Citation No. 328928

On November 8, 1978, an MSHA inspector issued a citation alleging a violation of 30 C.F.R. § 57.11-1, because Homestake failed to provide a safe means of access inside a manway. There was only a 13-inch clearance between the manway ladder and the timbers of the manway for a distance of six vertical feet. The cited standard provides:

> Safe means of access shall be provided and maintained to all working places.

The judge found that the stope was a working place within the meaning of 30 C.F.R. § 57.2, because one or more miners were working there. 8/ He also found that the manway was the only access to and from the stope. The judge held that Homestake violated the standard because it permitted men to work in a stope that had no safe means of access.

On review, Homestake asserts that the constricted manway led to a stope which was not a working place; the only work underway was repair of the binline which, together with the manway, constitutes the chimney. Therefore, it contends, the stope was not used as a means of access to a working place. The inspector testified that miners worked only part-time at repairing the binline, when they had no work to do in the stope. Homestake's supervisor testified that a miner was slushing in the stope above the stope nearest to the constricted portion of the manway. Tr. 525-530. In this regard, although he stated that he did not believe it was necessary for the miner to use the constricted manway, he could not say whether the miner had in fact used it. Id. Thus, in our view, substantial evidence supports the judge's finding that the manway was used as a means of access to a working place.

Homestake next argues that the judge erred in finding that the manway was the only access to and from the stope. This error, if any, is immaterial. In Hanna Mining Co., 3 FMSHRC 2045, 2046 (1981), we considered an identically worded standard, and held that "the standard requires that each 'means of access' to a working place be safe." (Emphasis added.) An operator may demonstrate that a cited area is not a means of access by proving that no "reasonable possibility" exists that a miner would use it to enter or leave a working place. Id. Here Homestake failed to establish that the manway was not used as a means of access to the working place; for example, it presented no evidence that the manway had been dangered-off to prevent employees, other than those engaged in repair, from using the constricted manway. Accordingly, we affirm the judge's finding of a violation.

violation of 30 C.F.R. § 57.17-1. That mandatory standard provides in part:

> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures....

The citation stated:

> Illumination was not sufficient for safe working conditions in servicing the sheave wheel ... and motor components of the Otis elevator located at the floor level on top of the elevator compartment. Light emitted from the warehouse windows located below the elevator floor made a blinding effect to observe the floor and equipment mounted on the compartment floor.

The shaft of the Otis elevator was contained in a separate box-like structure located above the top floor level and below the warehouse ceiling. The sheave wheel, which powered the elevator, was on top of the box-like structure.

The judge found that, although a flashlight or auxiliary light was needed to repair the sheave wheel, additional light was also necessary; improper lighting could have caused injury. He concluded that Homestake violated the standard.

Homestake argues on review that the standard was satisfied by using portable or auxiliary lighting. The operator also asserts that the Secretary did not meet his burden of proof because he relied solely on the inspector's subjective opinion as to the sufficiency of the illumination.

In Capitol Aggregates, Inc., 3 FMSHRC 1388, 1389 (1981), pet. for review filed, No. 91-4278 (5th Cir., July 22, 1981), we held that flashlights and auxiliary lights alone could satisfy the standard "where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances." In our view, Homestake has failed to establish that flashlights or auxiliary lights provided adequate illumination here. Nor did it show that auxiliary lighting was always used, in addition to flashlights, during maintenance and repairs. The judge's finding that the portable or auxiliary lighting was inadequate is supported by substantial evidence. Moreover, the judge properly credited the inspector's subjective opinion as to the sufficiency of the illumination in these circumstances. Capitol Aggregates, 3 FMSHRC at 1390. 9/ Therefore, we affirm the judge's finding of a violation.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Rosemary M. Collyer, Chairman, Concurring:

I did not participate in the consideration or disposition of Part I of this case because of prior representation of the Climax Molybdenum Company at a time when the Climax cases dealing with identical issues and decided by the Commission today, 4 FMSHRC --- (DENV 78-553-M et al. February 1982) were being tried and argued on appeal. I concur in the disposition of the citations in Part II.

Rosemary M. Collyer, Chairman

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February 16, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 79-202-M LAKE 80-24-M
AND	:	
LOCAL 5024, UNITED STEELWORKERS OF AMERICA,	:	
v.	:	
WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY	:	

DECISION

This case involves the interpretation of 30 C.F.R. § 57.12-82, a mandatory standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). Section 57.12-82 provides:

> Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines.

For the reasons that follow, and for those expressed in our decision in Homestake Mining Co., 4 FMSHRC ___ (CENT 79-27-M et al., February 1982), issued today, we reverse the judge and hold that White Pine Copper Division did not violate the standard. 1/

Three citations were issued in this case when an inspector observed power cables, which were suspended from the back (roof), in contact with metal air lines and with a support chain for an air line. The cables involved carry 440 or 480 volts. All have three individually insulated conductors and three grounding wires surrounde

The judge held that "powerlines" is not a term of art in electricity and that the "ordinary meaning" of the word includes the entire cable--conductors, insulation and jacketing. He found it "unlikely that the electrical cables would energize the metal lines". 3 FMSHRC 483. Nevertheless, because in his view the standard refers to the entire cable, the judge concluded that it requires additional insulation between the outer jacket of the cable and water, air or telephone lines.

As we noted in Homestake, the cables involved in these cases contain conductors that transmit electricity, and thus can be considered powerlines; therefore, section 57.12-82 applies to them. That standard must be read in conjunction with 30 C.F.R. § 57.2. 2/ The purpose of these standards is to prevent injury to miners as a result of contact with energized air, water or telephone lines. The Secretary relied on and the judge accepted, a blanket "rule" that section 57.12-82 requires additional insulation at crossover points without regard for the suitability of the insulation that in fact was present. We rejected this interpretation of the standard in Homestake. Under the standards, the insulation present in the cable must be examined in order to determine whether there has been a violation.

The judge found that the cables at issue here, which carry 440 or 480 volts, "have a maximum voltage rating of between 600 and 2,000 volts and have at least 25,000 volts of dielectric resistance." 3/ 3 FMSHRC 483. Further, undisputed evidence indicates that the neoprene jacket not only resists abrasion and flame (Tr. 215), but also has insulating qualities. Tr. 92, 232. The jacket was developed to withstand mine conditions and, as we noted above, these identical cables were approved by MSHA for use on the mine floor as trailing cables. The Secretary failed to prove that the insulation on the cables at issue was unsuitable or otherwise insufficient; therefore, he did not prove a violation of section 57.12-82.

nes insulated as follows:
ns separated from other conducting surfaces
nce permanently offering a high resistance
nt and to disruptive discharge through
substance is said to be insulated, it
ted in a manner suitable for the con-
ected. Otherwise, it is, within the
, uninsulated. Insulating covering

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

4/ Chairman Collyer did not participate in the consideration or disposition of this case because of her prior representation of the Climax Molybdenum Company at a time when the Climax cases dealing with identical issues and decided by the Commission today, 4 FMSHRC ___ (DENV 78-553-M et al., Feb. 16, 1982), were being tried and argued on appeal.

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February 16, 1982

CLIMAX MOLYBDENUM COMPANY	:	
	:	
v.	:	Docket Nos. DENV 78-553-M
	:	DENV 78-554-M
SECRETARY OF LABOR,	:	WEST 79-340-M
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
CLIMAX MOLYBDENUM WORKERS,	:	
LOCAL NO. 2-24410, OIL,	:	
CHEMICAL AND ATOMIC WORKERS	:	
INTERNATIONAL UNION	:	

DECISION

This case involves the interpretation of 30 C.F.R. § 57.12-82, a mandatory standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp III 1979). For the reasons that follow, and for those expressed in our decision in Homestake Mining Co., 4 FMSHRC ___ (CENT 79-27-M et al, Feb. 16, 1982), issued today, we reverse the judge's decision and hold that the Secretary of Labor failed to prove a violation of the cited standard. 1/

The relevant facts were stipulated. An inspector issued citations after observing power cables, which were hung in haulage drifts, in contact with air or water lines. The cables carry voltages of 110 to 440 volts and were in satisfactory condition. The cables never carry voltages greater than the manufacturer's insulation rating. The identica type of cable involved is also used as trailing cable and is approved by MSHA for that use under 30 C.F.R. § 18.36. As a general rule at the Climax Mine, air and water lines are on the opposite side of drifts from power cables. It is, however, sometimes necessary to locate air or water lines, or power cables, across a drift to transmit air, water or power to a specific location. Air lines, water lines, and power cables frequently cross at the intersections of drifts.

The judge noted that the term "powerlines" in section 57.12-82 "is not susceptible to a precise definition" and concluded that it en-

reasoned that, because the standard refers to the entire power cable, which itself contains insulation, it must require added insulation. The judge also cited the "harsh environment" in underground metal and non-metal mines in reaching his conclusion.

Section 57.12-82 requires:

> Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines.

As we noted in Homestake, the cables involved in these cases contain conductors that transmit electricity, and thus can be considered powerlin therefore, this standard applies to them. A powerline is not "insulated" unless it is insulated "in a manner suitable for the conditions to which it is subjected." 2/ The judge concluded that these cables, as they come from the manufacturer, are not insulated in a manner suitable for the conditions at the Climax Mine. He noted the possibility of damage to cables from fly rock, rubbing by haulage equipment, and dragging over sharp rock or metal edges. 2 FMSHRC 3699. Although consideration of the specific conditions to which the cables are subjected is appropriate, indeed necessary, we do not believe that the mere speculative possibility that they could sustain some externally caused damage is sufficient to render the cables "uninsulated". 3/

In order to prove a violation of section 57.12-82 the Secretary must show that the "powerlines" are not insulated from pipelines. In this case, he failed to prove that. The parties stipulated that these cables were in satisfactory condition. They are approved for use on the mine floor as trailing cables. In addition, the judge made several findings indicating that the cables are "substantially overdesigned". 4/ He found that the insulation in the cables has a dielectric resistance

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2/ 30 C.F.R. § 57.2 provides in part:

> "Insulated" means separated from other conducting surfaces by a dielectric substance permanently offering a high resistance to the passage of current and to disruptive discharge through the substance. When any substance is said to be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected. Otherwise, it is, within the purpose of this definition, uninsulated.

3/ We note that added insulation would also be subject to damage from these factors.

4/ The judge stated, "The testimony of Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines, supports Climax's contentions that the cables ... are substantially

of between 7,500 volts and 23,750 volts, depending on the composit the particular cable. 2 FMSHRC 3698. (The cables carry 110 to 44 volts.) He also noted that the cables' neoprene jacketing not onl "protect[s] the insulation from outside forces such as oils, acids alkalies, water or moisture, flame and abrasion", but also "has an insulating capability". Id. The judge's conclusion that these ca which we emphasize were in satisfactory condition, are not suffici insulated whenever they contact air, water or telephone lines is n supported by the evidence.

Accordingly, the decision of the administrative law judge is reversed and the penalties he assessed are vacated. 5/

Richard V. Backley, Commissione

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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February 25, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. BARB 76-95
v.	:	
U.S. STEEL CORPORATION	:	IBMA 77-1

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969. 1/ United States Steel Corporation (U.S. Steel) challenges an administrative law judge's decision holding it responsible for a violative condition created by an independent contractor working for U.S. Steel. For the reasons that follow, we affirm the judge's decision.

U.S. Steel contracted with American Drilling and Boring Company to perform drilling services at U.S. Steel's Lynch No. 37 Mine. American extracted cores from the earth to determine the strata and coal seams. On September 17, 1975, an MSHA inspector conducted a special inspection of the drilling operation under section 103(g)

1/ 30 U.S.C. § 801 et seq. (1976)(amended 1977). On March 8, 1979, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. III 1979). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

> the clutch assembly was broken, and there was no possible way for the drill operator to stop the drill in case of an emergency (section 77.404).

U.S. Steel filed an application for review of the order. The administrative law judge upheld the order and dismissed the application for review. U.S. Steel raises three issues on review: (1) whether it was properly cited for a condition created by its independent contractor; (2) whether the judge erred in finding an imminent danger existed at the time the order was issued, and (3) whether the judge erred in ruling that the order was legally issued.

The liability argument raised by U.S. Steel is identical to the argument rejected by the Commission in Republic Steel Corporation, 1 FMSHRC 5 (1979), and Kaiser Steel Corporation, 1 FMSHRC 343 (1979). Accordingly, based on our decisions in Republic and Kaiser, we affirm the judge's holding that U.S. Steel was properly cited for the condition created by its independent contractor. See also Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981)(quoting Republic decision with approval), and Harman Mining Corp. v. FMSHRC, No. 81-1189, 4th Cir. (December 24, 1981).

We also reject U.S. Steel's argument that an imminent danger did not exist at the time the order was issued. The judge found that "principles of common sense and reason support the inspector's determination that the operator of the machine could be seriously injured in the event that he could not disengage the clutch and stop the machine." Having carefully reviewed the record, we find that the evidence amply supports the judge's finding that an imminent danger existed at the time the order was issued. See Pittsburgh & Midway Coal Mining Co., 2 FMSHRC 787 (1980). Thus, the judge's finding is affirmed.

2/ Section 104(a) provided:

> If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

evidence on this issue is the inspector's testimony that he did not know whether U.S. Steel had been provided a copy of the complaint. This testimony falls short of establishing that U.S. Steel in fact was not served with the complaint. Also, U.S. Steel has not demonstrated how it was prejudiced by the alleged failure of service. Accordingly, we affirm the judge's finding that the order was validly issued.

For the above reasons, the decision of the judge is affirmed.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

3/ Section 103(g) provided in part:

Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator

Although my personal views on the issue of an owner-operator's liability for contractor violations under the 1969 Coal Act may be more in accord with the views expressed by Commissioner Backley in his dissent in Republic Steel, I concur with the result reached by the majority here. The 1969 Coal Act, under which the violation at issue arose, was amended during the pendency of this appeal. In previous cases construing the Coal Act, a majority of the Commission resolved the question presented adversely to U.S. Steel's position. Republic, supra; Kaiser, supra. I believe that no useful purpose would be served by re-examining this issue in the context of the 1969 Act. Accordingly, I vote to affirm.

Rosemary M. Collyer, Chairman

Backley, Commissioner dissenting:

Again, for the reasons expressed in my dissenting opinion in Republic Steel, 1 FMSHRC at 12-19, I must disagree with my colleagues. I believe it clear that U.S. Steel was cited improperly for the violations committed by its independent contractor.

Richard V. Backley, Commissioner

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February 25, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. MORG 75-265
v.	:	MORG 75-377-P
	:	
CONSOLIDATION COAL COMPANY	:	
	:	IBMA 76-69

ORDER

On January 4, 1982, the Secretary of Labor filed a motion for voluntary dismissal of this case. We issued an order on February 11, 1982, reserving ruling on the motion for 10 days from the date of our order so as to afford the participants in this proceeding the opportunity to file a response to the Secretary's motion. No responses have been filed with the Commission. Accordingly, the Secretary's motion for voluntary dismissal of this case is granted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

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Administrative Law Judge Decisions

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FEB 1 1982

CLEVELAND CLIFFS IRON COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. LAKE 80-295 Citation No. 286910; 4
SECRETARY OF LABOR, Respondent	:	Empire Mill
SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceedi
v.	:	Docket No. LAKE 80-417 A.C. No. 20-01012-0506
CLEVELAND CLIFFS IRON COMPANY, Respondent	:	Empire Mine or Mill
DISTRICT 33, UNITED STEEL WORKERS OF AMERICA, Representative of the miners	:	

DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Chilm
& Greenlee, Ishpeming, Michigan, for Cleveland C
Company;
Stephen P. Kramer, Esq., Office of the Solicitor
Department of Labor, Arlington, Virginia, for th
of Labor;
Ernest Ronn, Marquette, Michigan, and Paul S. Gr
Negaunee, Michigan, for the Representative of th

Before: Judge Broderick

STATEMENT OF THE CASE

The above cases were consolidated for hearing and decision a challenge to the propriety of a citation issued charging a vi mandatory safety standard contained in 30 C.F.R. § 55.15-6, and for a civil penalty based on the same citation. The citation c 50 gallons of fluid containing polychlorinated biphenol (PCB) s

Office and Richard Vik, District Manager of the MSHA North Central Dist Office Duluth, Minnesota, also testified on behalf of the Secretary. K Blau, an Industrial hygenist, and Leslie Jennings, both with the compan Central Safety Department; Jerry Oja, Mine Superintendent at the Empire Terry Steen, foreman, Francis B. Laurila, electrical shift supervisor, Laituri, operating engineer, and James Tonkin, Safety Coordinator, all Empire Mine; and Richard Walcott, an Industrial Hygenist with the Clayt Environmental Consultants, all testified on behalf of CCI.

Post-hearing briefs have been filed by each party. I have conside the contentions made in the briefs and based on the record and the cont of the parties, I make the following decision.

REGULATORY PROVISION

30 C.F.R. § 55.15-6 provides as follows:

> Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever (1) hazards of process or environment, (2) chemical hazards, (3) radiological hazards, or (4) mechanical irritants are encountered in a manner capable of causing injury or impairment.

FINDINGS OF FACT

1. Cleveland Cliffs Iron Company was, at all times pertinent to t proceeding, the operator of the Empire Mine or Empire Mill located in Marquette County, Michigan.

2. The Empire Mill is a large operation employing over nine hundr workers which produces products which enter interstate commerce.

3. On April 10, 1980, at approximately 6:50 p.m., a transformer o fourth level of the mill exploded resulting in a spill of 40 to 50 gall of askerel transformer oil.

4. The transformer oil contained a mixture of polychlorinated biphenyls (PCB's) and trichlorobenzine. The PCB's constituted from 55 70 percent of the oil.

5. The oil ran down to the control room located on the third leve through the grating to the second level, the main floor and the basemen

6. The basement contained launders (floor drains or ditches) desi to drain the overflow water in the milling process.

8. Following the December, 1979 spill there were discussions between A and company officials concerning the procedures to be followed in dling PCB spills. The company's Central Safety Office began preparing a an-up procedure including a training program for employees.

9. A written clean-up plan entitled "PCB Handling and Disposal," roduced in evidence as GX-3, was prepared and distributed to the mines i ly April 1980. Among other things it provided that the first priority i event of a spill is to control its spread by damming or diking the leak required in the event of a major spill that non-porous clothing, includi ber or vinyl gloves, jacket, pants and boots, be worn to prevent skin tact; that face shields and breathing apparatus be worn.

10. The company also prepared an employee training program including de show. It was sent first to the Tilden Mine and was at the Tilden Min April 10, 1980.

11. The written plan (GX-3) was received by the Empire Mine about il 8 or 9, 1980. It had not been implemented as of April 10. None of employees had received training in the handling and disposal of PCB's or to April 10.

12. Within 10 minutes of the spill on April 10, 1980, one employee wa to the warehouse to get rags, and a cart was dispatched to obtain bags "oil dry" which were located on the second floor about 1/16 of a mile fr site of the spill.

13. Six or seven employees were engaged in spreading rags and oil dry the control room floor in an attempt to contain the spill. Oil was sent on the walls, the control cabinets and an area approximately 10 fee are on the floor. Thereafter a fan was placed in the doorway to remove es. The employee lunch room was a short distance away on this level. employees were wearing ordinary work clothes including ordinary work es. One employee became nauseous from the fumes.

14. The employees then went to the basement and spread additional oil on the floor and attempted to prevent the oil from getting in the ders. They were still wearing regular work clothing. There was oil the handrailing to the basement, on the walls, dripping down the pipe an the basement floor. The employees got oil on their clothing including ir boots. One employee got some oil on his forearm and later developed tch.

15. After about 1 hour, the oil dry was all spread and the employees directed to remove their contaminated clothing and to shower. The ected areas were roped off.

17. On April 25, 1980, a citation was issued charging a violation 30 C.F.R. § 55.15-6.

18. On April 11, 1980, the company began to clean up the spill whi had been contained. The employees involved in this operation wore disposable rubber clothing including boots and gloves and face shields w respirators. MSHA officials were present at the mine during the cleanup

19. Following the April 10, 1980 oil spill the company plan for handling PCB spills was discussed at hourly employee safety meetings. Protective clothing was obtained and placed in a newly installed cabinet Mill Line 15.

20. PCB is a toxic substance and can cause damage to a person if inhaled, ingested, or contacted dermally. Exposure to PCB can cause dam to internal organs, especially the liver. A single short term exposure not ordinarily cause serious damage, however.

ISSUES

1. Are the terms of 30 C.F.R. § 55.15-6 impermissably vague?

2. Do the facts show that CCI failed to provide and use special protective equipment and special protective clothing on encountering haz in a manner capable of causing injury or impairment?

3. If a violation is shown to have occurred, was it caused by the unwarrantable failure of CCI to comply with the regulation?

4. If a violation is shown to have occurred, what is the appropria penalty therefor?

CONCLUSIONS OF LAW

A. The Regulation

Respondent challenges the regulation as vague on the ground that it fails adequately to advise mine operators "of the type of special protec clothing needed for compliance with the regulation." If Respondent's ar were accepted, it would require the regulations to spell out in detail t equipment and clothing required in the event of an infinite number of po adverse employment exposures. The regulation is clear and as specific a can reasonably be. The fact that (as Respondent argues) MSHA failed to provide specific guidance beyond the terms of the regulation does not ma impermissably vague. In fact the record clearly shows that prior to the violation alleged herein, Respondent had prepared a specific plan for de

that Respondent was aware of the requirements of the mandatory standard as related to PCB spills.

B. The Violation

Respondent asserts, and I concur, that the first priority in the event of a PCB spill is to prevent the fluid from entering water courses. This does not negate a requirement that workers engaged in the containment activity be protected from exposure. The requirements are in no way incompatible and there is nothing inherently impossible about their being observ simultaneously. Specifically related to the situation under consideration, there is no reason why the employees who were sent for rags and oil dry cou not also have obtained protective equipment and protective clothing. In fa they were not directed to obtain the latter. The evidence is clear that protective equipment and protective clothing were not provided for or used by the employees engaged in the containment of the PCB spill on April 10, 1980. The evidence is also clear that the exposure to the PCB caused at least two injuries: one worker experienced nausea from the fumes and one worker suffered a temporary dermatitis from skin contact with the oil. The record further indicates that the spill resulted in hazards to workers capable of causing further injury or impairment. Therefore a violation of 30 C.F.R. § 55.15-6 is established.

C. Unwarrantable Failure to Comply

Respondent was aware in July, 1979 that PCB was used in transformers at its mines. In December 1979 a spill occurred, and Respondent was aware of the need to establish a procedure to be followed to contain future spill and to train employees in implementing it. It was aware of the danger of PCB contamination of water courses and of the hazards of employee exposure to the substance. It had in fact prepared a written procedure to handle PC spills and was in the process of training its employees. But the plan was not implemented; the employees involved were not trained, despite a 4-month period following the December, 1979 incident. Does this constitute an "unwarrantable failure to comply" with the standard? If a violation result from an operator's failure to correct conditions or practices which it knew or should have known existed, the violation is the result of its unwarranta failure to comply. Zeigler Coal Company, 7 IBMA 280 (1977). Based on that standard, I conclude that the violation found herein resulted from CCI's unwarrantable failure to comply with the regulation.

D. Penalty

The parties have stipulated that CCI is a large operator, that it has moderate history of previous violations, and that the imposition of a reasonable penalty will not affect its ability to continue in business. Based upon my analysis of unwarrantability, supra, I conclude that the violation was caused by ordinary negligence of CCI. Injuries resulted from th

The citation was not issued for this violation until April 25, 1980. Prior to that date, CCI picked up the contaminated clothing and directed affected employees to shower. On April 11, 1980, the clean-up program was begun and the employees involved were provided with special protective equipment and special protective clothing. The written program for handling PCB spills was implemented following the April 10 spill and was discussed at employee safety meetings. Protective clothing was placed in a special area for employee use. These facts show that CCI demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

I conclude that an appropriate penalty for the violation is $750.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. The contest of the citation is denied and the citation is AFFIRMED.

2. CCI shall pay the sum of $750 as a penalty for violation of 30 C.F.R. § 55.15-6 within 30 days of the date of this decision.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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Mr. Harry Tuggle, United Steelworkers of America, AFL-CIO-CLC, Five Gateway Center, Pittsburgh, PA 15222

Mr. Ernest Ronn, Safety and Health Coordinator, District 33, United Steelworkers of America, 706 Chippewa Square, Marquette, MI 49855

FEB 2 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
v.	)	DOCKET NO. CENT 80-337-M
SIERRA BLANCA MILLING & PROCESSING CO., Respondent.	)	A/C No. 29-01796-05002
	)	MINE: Sierra Blanca Mill

DECISION AND ORDER

Appearances:

Allen Reid Tilson, Esq., Office of the Solicitor
United States Department of Labor, 555 Griffin Square, Suite 501
Dallas, Texas 75202
For the Petitioner

Billy D. Thomas, President
Sierra Blanca Milling & Processing Company
Ruidoso, New Mexico 88345
Pro Se

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Petitioner filed a petition pursuant to the Federal Mine Safety and Health Act of 1977 (the "Act") requesting the assessment of a civil pe against the respondent for alleged violation on January 16, 1980, of 3 C.F.R. § 55.15-6 1/

1/ The pertinent part of the regulation states as follows:

Mandatory. Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable cond and used whenever (2) chemical hazards ... are encountered in a m

since September 16, 1979.

At the commencement of the hearing an additional issue was added the respondent. Respondent contended that it had also intended to con seven other citations which had also been served on respondent for all violations occurring on January 16, 1980, and January 17, 1980.

The petitioner contends that the Office of Assessments had duly notified respondent that the forms which were sent to it were the ones which it should make notice of contest; and that since respondent prope completed only one of the forms, it did not contest the other citations issued. Thus, having failed to contest those citations in accordance w the rules of procedure, the proposed penalties became the final order o the Commission and were not subject to review.

The petitioner agreed that ruling on whether or not all eight citations were at issue instead of just the one alleged by the petition would be reserved until evidence on all citations were received at the hearing. Accordingly, evidence was presented as if the complaint had alleged all eight citations along with proposed penalties applying there

Findings and Conclusions in Regard to Ruling Reserved at the Hearing

After the proposed assessment forms on all eight citations had been sent to the respondent by the Office of Assessments of MSHA, respondent, within the 30 days allowed, wrote on one of the cards which had been sen to him, the following words:

> "None of the penalties applied to our operation! No mining operations since August 1979."

Respondent had also marked an "X" on the card by the following printed words:

> "I wish to contest and have a formal hearing on all the violations listed in the proposed assessment."

The card was signed "Billy D. Thomas, Pres."

The card was stapled to the other cards which respondent had receive nd all the cards were returned to and date stamped by the Office of ssessments on June 23, 1980. However, none of the other cards had any otations on them indicating whether or not any further citations were eing contested. Respondent had also sent a letter which was received by he same Office of Assessments on June 16, 1980, in which respondent liste ll eight citation numbers. In the letter respondent all itations did not

was not signed separately; they were all sent together in one letter. The notation by "Billy D. Thomas, Pres.", showed that he did not believe any the "penalties" applied to his corporation. Thus, all of the citations were placed in issue.

I find that respondent was in substantial compliance with procedural rule 25 in that the petitioner received the return cards and the letter within the required 30 days. Therefore, all eight citations were properl at issue at the hearing.

Additional Findings and Fact:

1. There is no history of previous violations by the respondent.

2. Respondent is a small operator.

3. The assessment of penalties proposed will not affect respondents ability to continue in business.

4. Respondent demonstrated good faith in attempting to achieve rapi compliance after notification of the alleged violations.

CITATION NO. 173877

Petitioner alleges that the operator in charge of the mill had not given the required notice to MSHA pursuant to 30 C.F.R. 55.26-1 2/, before commencement of construction of its mill, and that the mill had be under construction for approximately four months prior to the inspection January 16, 1980. Respondent contends that it was merely landlord of the property which it had subleased to two other companies, namely, Eagle Pea Mining Company and Double Eagle Mining Company, and, that, therefore, respondent was not responsible for the alleged violations.

The MSHA inspector testified that when he arrived at the site there was "beginnings of what was required to construct a mill." There was a corrugated metal building under construction with dimensions of approxi- mately 30 feet by 60 feet. There was a partly submerged tank in place to hold fluid and an earthern tank at the rear of the building with a drain from the building to the tank. There was a house trailer also located on the site. Three persons were in the metal building disassembling the fittings on a large vat which was not in operation. Electrodes had not

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2/ The pertinent part of the regulation states as follows:

Mandatory. The owner, operator, or person in charge of any metal an nonmetal mine shall notify the nearest Metal and Nonmetal Mine Safety an

construction and that ore would be milled by a mill located nearb
such time as construction of the mill on which they were working
completed. The minerals to be milled or processed were coming fr
Jicarilla Pit, a location owned by the respondent.

Since the facility and equipment were to be used in the mill
minerals, the location inspected constituted a mine and was subje
jurisdiction of the Act, according to the definition contained in
3(h)(1) of the Act. The pertinent part of that section defines a

> "... lands, structures, facilities, equipment, ... or other property ... to be used in the milling of such minerals ...

The cited regulation, 30 C.F.R. 55.26-1, does not require th
facility be in any particular stage of completion before the requ
notification must be given to MSHA. The regulation requires that
given of the approximate or actual date the operation will commen
Since no notice had been given as required, there was a violation
regulation.

The question then is, who was the "owner, operator, or perso
charge" who should have given the notification to MSHA? By way o
respondent has denied that it was the operator, but was merely "l
of the property where the mine facility was located.

The definition of "operator" is set forth in section 3(d) of
and includes:

> "... any owner, lessee, or other person who operates, contro or supervises a ... mine ...".

To control is to "exercise restraining or directing influenc
matter. 3/ The conduct of the respondent must be examined in ord
determine whether or not respondent exercised control over the mi
facility. If respondent did exercise control, then respondent is
operator; but if respondent did not exercise control, then by def
respondent is not an operator. It should also be noted that the
of operator in the Act does not mention that the control or the s
of the operator must be exclusive.

3/ Black's Law Dictionary defines to control as to "exercise res
or directing influence over; regulate; restrain; dominate ...".

Mineral Recovery, Inc., (hereinafter, "American") which had a mill on la contiguous to the six acres. The respondent leased the property because American wanted respondent to set up a refinery in order to refine the o processed through the mill at American. The ore would come from respondent's Jicarilla pit to the mill at American. After it was processe there, it would go to respondent's refinery located on the six acres of land leased from American. The refined concentrate would then be sent t the smelter. When respondent leased the acreage from American there wer no improvements on the property. Respondent had moved a house trailer o the property in preparation for pursuing refinery operations.

Billy Thomas testified further that the six acres leased was then subleased to two entities, namely, Eagle Peak Mining Company and Double Eagle Mining Company. Dale Runyon was the apparent owner of Eagle Peak Mining Company. A contract introduced into evidence showed that America was planning to mill respondents ore and also ore supplied by Mr. Runyo Billy Thomas testified that his agreement with Mr. Runyon was that when Runyon finished using the building that Double Eagle Mining Company and Runyon were constructing on the six leased acres, they would vacate it, respondent would then become owner of the building. It was anticipated that Mr. Runyon and Double Eagle Mining Company would use the building about six months. The sublease between these parties was never signed a no copy of it was received into evidence.

Assuming the facts as to be as stated by respondent, it is apparent from a review of all the testimony and exhibits that respondent had exercised substantial control over the operation of the facility. This conclusion is reached based on the following facts:

1. Although the site had been subleased to Eagle Peak Mining Compa and Double Eagle Mining Company respondent exercised control over the property by moving the house trailer onto the property November, 1979, approximately two months before the inspection.

2. When the MSHA inspector arrived at the site on January 16, 1980 three persons were disassembling fittings on a large vat. Two of those persons were employed by Double Eagle Mining Company, but the third pers was employed by the respondent.

3. Two persons employed by Double Eagle Mining Company at the site told the MSHA inspector that Billy Thomas, President of the respondent, frequented the site to give them instruction and to supervise, guide, or direct the operation.

4. The MSHA inspector observed that three persons may have been in contact with cyanide while working on the vat. When Billy Thomas was contacted by the inspector in regard to the presence of cyanide, Thomas

indicated he did not approve its use, but he would provide "th
with protective clothing. After Thomas found out about the us
on the property he directed the owner to remove it.

5. At some time prior to January 16, 1980, Billy Thomas
son, who was employed by the respondent, along with another em
respondent, to the leased property with instructions to help t
persons who were working there on the construction of the buil
install the roof trusses. Of the three persons already workin
building, two were employees of Double Eagle Mining Company an
employee of the respondent. These were the same persons who w
at the time of the inspection on January 16, 1980.

6. Respondent had operated a mill in another location pr
time the six acres were subleased from American. After the in
MSHA inspector contacted Billy Thomas by telephone, and Mr. Th
the inspector that he thought he had already informed the Fede
ment of his change of location by showing it on a quarterly em
form. This indicates that respondent intended to change his b
location to the new site prior to the inspection.

7. On January 17, 1980, the son of Billy Thomas who was
the respondent corporation went to the mill site to remove som
from the mobile home. While he was there he encountered the M
and the three persons who had been working there. The MSHA in
informed Mr. Thomas' son that he had closed down the building
due to some problems. Thomas' son told the three persons who
working, two employed by Double Eagle Mining Company and one e
the respondent, to keep out of the building until "we get ever
straight". The MSHA inspector gave the citation to Thomas' so
them to Billy Thomas.

8. When the MSHA inspector contacted Billy Thomas to ask
in charge at the work site, Thomas said that Ted Zamora was in
that Thomas would send Zamora a letter to that effect. At tha
was being paid as an employee of Double Eagle Mining Company.

If respondent had merely leased the six acres and exercis
control over the improvements being constructed, respondent wo
classified as the operator according to the definition. Howev
respondent's conduct shows that the sublease to Double Eagle M
and Eagle Peak Mining Company was not an "arm's length" transa
Respondent continued to exercise some control over the operati
though two of the employees present when the inspection took p
employed by Double Eagle Mining Company.

clothing was not provided to employees in violation of 30 C.F.R. 55-50.6. [1] Employees were observed working on a chemical vat that had previously been used in a cyanide milling process. The liquid solution c cyanide liberated from the vat was observed as having saturated an area c sand approximately 10 feet by 10 feet. The employees were required to wo over and walk through the sand and liquid material. The employees were wearing leather boots with neoprene soles. One employee was wearing leather gloves, and one was not. Thus, the employees were wearing no special protective clothing.

When the samples, taken from the liquid solution and sand that was directly under the vats where workers were standing, were analyzed by a laboratory, it was found that they contained quantities of cyanide. The testimony was undisputed that the workers could have become ill from contact with the cyanide while using no special protective clothing.

Petitioner has shown by preponderance of the evidence that there wa violation of the cited regulation. The Citation should be affirmed.

CITATION NO. 173873

Petitioner alleges that hazardous material was being stored in the corrugated metal building in an open 55 gallon drum which was not labele to indicate the hazardous material contained therein, namely, ore concentrate material containing cyanide. A violation of 30 C.F.R. 55. 16-4 [4] was alleged.

The evidence is undisputed that the drum was not labeled. A sample taken from the drum was analyzed by a laboratory and it was found to contain cyanide. Petitioner's witness testified without rebuttal that ha the material been picked up by an employee, the cyanide could have been absorbed into the skin and could have caused illness.

Since the material allegations of Petitioner have been proven by a preponderance of the evidence, the Citation should be affirmed.

4/ Mandatory. Hazardous materials shall be stored in containers of a t approved for such use by recognized agencies; such containers shall be labeled appropriately.

the mine site to take charge in case of an emergency, in violat
C.F.R. 55.18-9.5/

The MSHA inspector testified that when none of the three pe
the site would admit to being in charge, the inspector telephone
Thomas, President of the respondent, and Thomas said that Ted Za
employee being paid by Double Eagle Mining Company, was in charg
he "always had been". Thomas also stated that he would send Zan
letter to that effect.

Based on the testimony of Billy Thomas, I find that Ted Zan
designated as a competent person in charge, and that he was in a
at the time of the inspection.

Accordingly, the Citation should be vacated.

CITATION NO. 173875

Petitioner alleges a violation of 30 C.F.R. 55.15-1.6/ The
Citation alleges that water or neutralizing agents were not avai
employees to use in the event of contact with corrosive chemical
harmful substances being stored at the mill.

There was a 55 gallon drum of ore concentrate on the proper
analysis of the material in the drum showed that it contained so
cyanide. Petitioner's witness testified that absorption of the
into the unprotected skin of a worker could cause illness. Ther
cyanide present in the sand under the vat on which the employees
working.

Water was available on the adjacent property at American, b
was no evidence to show that this water would have been availabl
times while persons were working on respondent's property.

5/ Mandatory. When persons are working at the mine, a competer
designated by the mine operator shall be in attendance to take c
case of an emergency.

6/ The pertinent part of the regulation states as follows:

Mandatory. ... water or neutralizing agents shall be avail
where corrosive chemicals or other harmful substances are stored
or used.

CITATION NO. 173876

Petitioner alleges that adequate first aide material including blankets were not provided at the mill site. Further allegations are that the three employees working at the mill stated that they had not seen or been informed as to the location of any first aid material at the mill, al in violation of 30 C.F.R. 55.15-1. 7/

Respondent presented no evidence that adequate first aid materials were provided. Thus, the petitioner has proven by a preponderance of the evidence that the cited regulation was violated. The Citation should be affirmed.

CITATION NO. 173879

Petitioner alleges that records of examination of each working place that were conducted by a competent person designated by the operator and conducted at least once each shift were not available for review by an MSH representative. 8/

The evidence shows that the improvements on the property were still under construction and development, and that there was no production nor any particular designated work place or shift for the three employees. 9/ Under these circumstances I find that no violation has been proven by preponderance of the evidence. The Citation should be vacated.

7/ The pertinent part of the regulation states as follows:

Mandatory. Adequate first aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. ...

8/ The pertinert part of the regulation states as follows:

Mandatory. A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health ... (b) a record that such examinations were conducted shall be kept by the operator for a period of on year, and shall be made available for review by the Secretary or his authorized representative.

9/ A shift is defined as the "number of hours or the part of any day work Also called tour." U.S. Department of the Interior, Bureau of Mines, a Dictionary of Mining, Mineral, and Related Terms. Page 1000 (1968).

retained at the immediate mine site office and made [illegible] an MSHA representative in violation 30 C.F.R. 50.30(a). 10/

At the time of the inspection on January 16, and 17, 1980, the no Form 7000-2 at the mine site. According to the requirements of regulation the quarterly report for employees who worked in January would not be due until 15 days after the quarter ended on March 31, The lease agreement in which the six acres were subleased from Amer dated October 16, 1979. Although an individual may have worked at during the quarter of October, November, and December, there was no evidence presented to show what took place during that period of ti Thus, the petitioner failed to present evidence that any individual at the mine during a calendar quarter which would have required tha 7000-2 be filed.

The petitioner having failed to present a prima facie case, th Citation should be vacated.

In regard to all citations which should be affirmed, I find th gravity of the violations was not serious, and that the operator is chargeable with ordinary negligence.

CONCLUSION OF LAW

1. The undersigned Administrative Law Judge has jurisdiction parties and subject matter of these proceedings.

2. The Petitioner has proven by preponderance of the evidence the Respondent violated the regulations as cited in Citation Nos. 1 173872, 173873, 173875, and 173876.

3. The Petitioner has failed to prove by a preponderance of t evidence that Respondent violated regulations as cited in Citation 173874, 173879, 173889.

10/ The pertinent part of the regulation states as follows:

(a) Each operator of a mine in which an individual worked duri day of a calendar quarter shall complete a MSHA Form 7000-2 in acco with the instruction and criteria in section 50.30-1 and submit the original to ... MSHA ... within 15 days after the end of each calen quarter.

are vacated. The following Citations are affirmed and the respondent is ordered to pay civil penalties assessed in the total sum of $578.00 with 30 days from the date of this Decision.

CITATION NO.		CIVIL PENALTIES ASSESSED
173877		$ 20.00
173872		240.00
173873		240.00
173875		44.00
173876		34.00
	TOTAL	$578.00

Jon D. Boltz
Administrative Law Judge

Distribution:

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Mr. Billy D. Thomas, President
Sierra Blanca Milling & Processing Company
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Ruidoso, New Mexico 88345

FEB 2

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MASSEY SAND AND ROCK COMPANY, Respondent.	CIVIL PENALTY PROCEED DOCKET NO. WEST 80-94 A/C No. 04-10854-0500 MINE: Indio Pit & Mil

Appearances:

Linda R. Bytof, Esq., Office of Daniel W. Teehan, Regional Solic
United States Department of Labor, San Francisco, California
For the Petitioner

Jack L. Corkill, Esq.
Indio, California
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and He
Administration, (MSHA), charges respondent Massey Sand and Rock
(Massey), with a violation of 29 C.F.R. 56.11-1, 1/ a regulation
adopted under the Federal Mine Safety and Health Act, 30 U.S.C.
Respondent denies that a violation occurred and further contests
propriateness of the penalty.

After notice to the parties a hearing on the merits was hel
California.

1/ The cited regulation provides as follows:

§ 56.11 Travelways, 56.11-1 Mandatory. Safe means of acces
provided and maintained to all work places.

violates constitutional due process. Further, did a violation occur, and if a violation is found, what penalty, if any, is appropriate.

FINDINGS OF FACT

1. In April, 1979, Randall Thompson was employed by Massey as a mechanic welder and loader operator (Tr. 9).

2. Thompson's duties included servicing equipment and routine maintenance (Tr. 10).

3. His duties also involved greasing the head pulley above the sand silo.

4. The head pulley is 35 to 40 feet above the ground (Tr. 15).

5. On April 27, 1979, as he had on other occasions, Thompson walked up the conveyor belt to reach the head pulley (Tr. 15-18).

6. There was no walkway, handrail, ladder, or work platform (Tr. 16-17, Exhibit R-6).

7. As he began to grease the head pulley the conveyor started and threw him into the bottom of the silo (Tr. 15, 22).

8. Thompson had never been told not to climb the conveyor belt (Tr. 18-19).

9. Massey abated by installing a ladder to reach a work platform equipped with handrails (Tr. 42, 149).

10. In January 1979, prior to Thompson's fall an MSHA inspector discussed workers climbing conveyors. The inspector indicated a crane and cage could be used to provide safe access if the cage itself complied with MSHA regulations (Tr. 142, Exhibit P-3).

11. Massey has safety programs and frequent tool box safety meetings (Tr. 110, Exhibit R1-R5).

12. All of Massey's other conveyors have work platforms at the head pulleys. These platforms can be reached by ladder or stairway (Tr. 22).

DISCUSSION

The threshold question is whether the regulation in issue can withstand respondent's attack of vagueness.

penalties for their violation. Cf Brennan v. OSHRC, 505 F. 2d (10th Cir. 1974); Diebold, Inc. v. Marshall, 585 F. 2d 1327, 13 (6th Cir. 1978); Longview Refining Co. v. Shore, 554 F. 2d 100 (Temp Emer., Ct. App. 1977), cert denied 434, U.S. 836 (1977).

In deciding whether a safety standard satisfies the princi process, the regulation must be examined "in the light of the c which it is applied" Ray Evers Welding Co. v. OSHRC 625 F. 2d 7 Cir. 1980); United States v. National Dairy Products Corp. 372 (1963).

The appellate courts have considered the vagueness argumen connection with regulations promulgated under the Occupational Health Act (OSHA), 29 U.S.C. 651 et seq.

One line of cases dealing with the personal equipment regu applied an objective "reasonable" test. That is, whether a rea prudent person familiar with the circumstances of the industry protected against the hazard. American Airlines, Inc. v. Secre Labor 578 F. 2d 38, (2nd Cir. 1978); Voegele Co. v. OSHRC 625 F 1079 (3rd Cir. 1980); Bristol Steel & Iron Works, Inc. v. OSHRD 717, 723 (4th Cir. 1979) Ray Evers Welding Co. v. OSHRC, supra, at 731-732; Arkansas Best Freight's System Inc. v. OSHRC 529 F. (8th Cir. 1976); Brennan v. Smoke Craft, Inc., 530 F. 2d 843, 8 1976). The First Circuit explained that "knowledge of the exis hazardous situation must be determined in light of the common e an industry, but that the extent of precautions to take against hazard is that which a conscientious safety expert would take" Dynamics v. OSHRC, 599 F. 2d 453, 464 (1st Cir. 1979).

On the other hand, the Fifth Circuit, by contrast, has lin reasonableness standard to the custom and practice of the indus Ryder Truck Lines, Inc. v. Brennan 497 F. 2d 230, 233 (5th Cir Court said the general industry safety standard was not unconst vague as long as it "affords a reasonable warning of the proscr in the light of common understanding and practices", B & B Ins Inc. v. OSHRC 583 F. 2d 1364 (5th Cir. 1978). See also Cotter OSHRC 598 F. 2d 911 (5th Cir. 1979); Power Plant Division, Brow Inc. v. OSHRC 590 F. 2d 1363 (5th Cir. 1979).

The other circuits have not followed the Fifth Circuit in reasonableness to the custom and practice of the industry becau First Circuit explained, such a ruling "would allow an entire i avoid liability by maintaining inadequate safety training." Ge Dynamics supra. supra 2d at 464, accord Voegele Co., supra at 1

employees" Ray Evers Welding, supra at 732.

Under either line of cases Massey cannot complain that the regulati is vague. The photographs show that Massey maintains an extensive conve system (Exhibit R-6, photographs 2 and 3). All of Massey's conveyors, the single exception of where Thompson was injured, have work platforms the head pulleys. The platforms are reached by ladder or stairways. Fr these facts I conclude that Massey, as its own conscientious safety expe recognized the hazard by providing work platforms for all but one head pulley.

Massey's post trial brief argues that MSHA regulations do not prohi its employee from walking on the conveyor belt. Massey's argument overlooks the thrust of the regulation. The regulation requires safe access to all working place. One method of safe access could be the installation of a ladder, and a work platform with handrails. Another method of safe access could have been the use of the crane and man cage. In this case Massey abated with the former and failed in the proof of th latter.

The cases cited by Massey are not inopposite this view. In Cape an Vineyard Division of New Bedford Gas v. OSHRC 512 F. 2d 1148 (1st Cir. 1975) the Court stated: "an appropriate test is whether a reasonable prudent man familiar with the circumstances of the industry would have protected against the hazard." As previously stated here Massey recogni the hazard.

In Diebold, Incorporated v. Marshall, 585 F. 2d 1327 (6th Cir. 1977 the Court held that a point of operation guarding of power presses was properly applied to press brakes. However, the Court would only apply t standard in the future. This was based on the view that a portion of th standard was unartfully drafted, that there was a common industry understanding regarding the guarding of press brakes, and that there was administrative enforcement indicating that the safety regulation was inapplicable to press brakes. None of the above situations obtain here. The standard is clear and concise. There is no common industry understanding that work platforms should not be provided. Further, ther is no showing that MSHA ever considered the regulation inapplicable.

In Kent Nowlin Construction v. OSHRC 593 F. 2d 368 (10th Cir. 1979) the Court reversed the finding of a violation of 29 C.F.R. 1926. 652(h) The Court ruled that Kent Nowlin "should not be penalized for deviating from a standard the interpretation of which, in relation to kindred standards cannot be agreed upon by those responsible for compelling compliance with it and with oversight of the procedures for its enforcement."

v. Rosenberg 302 F. 2d 652 (9th Cir. 1962); Jordan v. DeGeorge 341 U.S. 22 (1951); and Rodine-Becker Co. Docket No. 75-651 but those cases are not applicable to these facts.

CIVIL PENALTY

Section 110 of the Act, (30 U.S.C. 820(i)), provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Concerning the Massey's history: there have been four violations in the previous 24 months (Tr. 4). Massey is a small to medium size operato the company operates 40,098 man hours per year. The Indio pit and mill operates 18,250 man hours per year (Tr. 4). The assessment of a penalty will not affect Massey's ability to continue in business (Tr. 4).

The company was negligent since the lack of a work platform was apparent. The gravity of the violation was severe since an employee was working in an unguarded position at the head pulley 35 to 40 feet above t ground. Massey rapidly complied and installed the necessary platform and safe access.

The Secretary proposed a special assessment of $2,500.00 (Exhibit P-2). I disagree. The Secretary's proposal overly concentrates on the gravity of the violation. The remaining favorable statutory criteria cannot be ignored. Considering the statutory criteria I assess a civil penalty of $500.00.

ORDER

1. Citation 379052 is affirmed.

2. A civil penalty of $500.00 is assessed.

John J. Morris
Administrative Law Judge

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FEB 2

COLORADO WESTMORELAND, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION F DOCKET NO. WEST 81-24 Citation No. 789250 DOCKET NO. WEST 81-24 Citation No. 789251 (Consolidated) MINE: Orchard Valley

DECISION

Appearances:

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633 Seventeenth Street, Denver, Colorado 80202
For the Contestant

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294
For the Respondent.

Before: Judge John A. Carlson

STATEMENT OF THE CASE

These consolidated cases, heard under the provisions of the Fe
Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "A
arose from an inspection of contestant's underground coal mine. Th
Secretary of Labor's inspector issued two citations alleging violat
contestant's (Westmoreland's) approved roof control plan. The stan
published at 30 C.F.R. § 75.200, requires compliance with such a pl
violations were designated "unwarrantable" under section 104(d)(1)
Act, and the second citation was coupled with a withdrawal order unc
section 104(d).

Westmoreland duly contested the citations and the order and a f
hearing on the merits was had. No jurisdictional issues were raised
Extensive post-hearing briefs were filed by both parties.

CITATION 789250 - DOCKET NO. WEST 81-240-R

The Secretary's inspector made his inspection on April 15, 1981. Th approved roof control plan (joint exhibit 1) requires that entry widths cut to 20 feet or less, and that roof bolts be installed on 5 by 5 foot centers. It also provides that where "... the distance between outer b and the rib exceeds five feet, additional bolts or timbers will be installed." 1/

Westmoreland witnesses did not dispute the inspector's testimony th the entryway between rooms 7 and 8 measured approximately 26 feet wide its widest point at the time of inspection. Witnesses for both parties agreed that rib sloughage had occurred. Beyond that point, however, witnesses for the two parties differed sharply on most material facts.

The inspector insisted, first of all, that the roof control plan requires that "roadways" be 20 feet or less in width. Westmoreland correctly contends, however, that the plan contains no such injunction. requires only that entryways (which may also serve as haulageways) may be cut to a width greater than 20 feet. Although the citation was writt in terms of a "roadway" violation the inspector ultimately acknowledged that the plan speaks only to the width of the original cut (Tr. 37, 38)

The essence of Westmoreland's defense is this: that all cuts were within the prescribed 20 foot limits, but that on the morning of the inspection a phenomenon known as "bounce" caused a sudden sloughage fro the ribs and a consequent widening of the entry area; and that miners w already at work setting additional timber along both sides of the area question when the inspector arrived.

1/ The pertinent part of the citation reads:

> The approved roof control plan was not complied with in the 8 cr cut, the numbers 7 and 8 rooms of 5 east pillar section as the width of the entries measured from 25 to 30 feet and additional support such as posts were not installed to limit the roadway to 20 feet, and in the entrance the number 8 room the distance from the last roof bolt to the rib measured in excess of 10 feet.

when the operator took steps to correct it, and what those steps were

Westmoreland's section foreman claimed that timbering was already progress at the end of the previous shift at a point near room 7, and timbers were set near the ribs as a routine precaution against rib sl age (Tr. 81). He maintained that he put two men to work continuing t timbering with the beginning of the morning shift; and that at 7:15 a had measured the width of the entryway and found it to be 18 feet. According to this witness, a severe "bounce" or sudden shifting of the strata, occurred early in the shift, causing extensive rib sloughage between rooms 7 and 8 and widening the roof (Tr. 62-63). A second bo shortly thereafter, caused more sloughage. The bouncing, he claimed, also severe enough to knock down the tubing between the 7th and 8th crosscuts (Tr. 63).

The inspector, however, was convinced that the sloughage was the product of a gradual process (squeeze or heave) (Tr. 48-49, 145-146). based this opinion on his general experience in underground mining co with specific expertise gained from tutelage under a now-retired insp who was an acknowledged MSHA authority on bouncing. Bouncing was unl he said, at depths above 1,500 feet (the area in question here was 70 and was also unlikely except in proximity to the face. Moreover, the of the coal pieces were too large to be typical of bounce.

Westmoreland points out, however, that the inspector had paid bu visits to this particular mine, and that all of its witnesses substan ed the section foreman's claims. Two roof bolters and the underground supervisor testified that bouncing, an almost daily phenomenon in the had indeed occurred that morning. These witnesses and the operator's safety coordinator further pointed to rock dust as evidence of the ab and recent character of the sloughage. The undisputed evidence estab that the ribs, roof and faces had been fully rock dusted at the end o previous shift. Had the sloughage occurred gradually over a period o several days, as the inspector inferred, sloughed materials would hav dust-covered. The inspector made no effort to contradict the uniform testimony of Westmoreland's employees that all sloughage areas on the morning of the inspection were dust-free.

I am convinced that the sloughage occurred in the way described operator -- abruptly on the morning of the inspection. The direct ev of Westmoreland's several employees is far more persuasive than the inferences drawn by the inspector.

It is nevertheless true, of course, that when the inspector arri the area between rooms 7 and 8 was not in compliance with the literal requirements of the roof control plan. The roof was too wide and was yet supported. Does this, without more, signify violation? Given al

causes beyond the operator's control. At page 17 for example, it provides

> Where pillar corners have sloughed off excessively, more than five feet from the nearest support, they will be supported with additional bolts or timber posts.

This implies, certainly, that the operator has a reasonable time in which to correct roof support deficiencies arising from sloughage.

Generally, under the Act, operators may not successfully defend against a violation of a mandatory standard on the basis that it occurred without negligence or fault. United States Steel Corp. 1 FMSHRC 1306 (1979); Heldenfels Brothers, Inc. 2 FMSHRC 851 (1980), aff'd 636 F. 2d 312 (5th Cir. 1981, unpublished).

That general rule cannot apply here, however. The standard demands compliance with the roof control plan; but the plan itself contemplates remedial measures for sloughage. It would follow, then, that if the operator takes those measures, and does so with dispatch and in conformity with procedures established elsewhere in the standards for setting of additional supports and for cleaning up rib sloughage, no liability ensues.

I would view the matter differently had Westmoreland been dilatory or had it proved indifferent to the hazards resulting from the sudden creatio of unsupported roof areas. The credible evidence shows, however, that after the bounce no mining occurred in or beyond the sloughage area and crews set to work quickly to clean up the loose material from the floor an to set additional supports.[2/] Also, the record allows no inference that the means used to remove the sloughage and set the additional timber did not accord with other parts of the plan which dictate safe and acceptable procedures for those tasks. (See, for example, page 10A, Roof Control Plan). On the contrary, the inspector acknowledge that no one was working under an unsupported top (Tr. 21).

Accordingly, the evidence does not show a failure by Westmoreland to

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2/ Subsequent discussion in connection with citation 789251 will show tha bolters were in room 8 during a part of the time in question, but they,

Later the same morning the inspector issued his second citation whi
he coupled with a withdrawal order under Section 104(d)(1).[4/] This
citation and order concern alleged conditions and miners' conduct in roo
8 immediately located around the corner, so to speak, from the entryway
discussed earlier. According to the inspector, the outer edges of the "
bars (the ATRS System) which furnished temporary protection to roof bolt
personnel while bolting was in progress were more than 5 feet from the r
of the room. Thus, under the terms of the roof control plan, no one cou
be under the unsupported portion of the roof between those outer edges a
the rib. Westmoreland's witnesses did not dispute that the measured
distances between the rib and the outer edges of support system were
approximately nine feet to ten feet (Tr. 31).

These witnesses sharply challenged the inspector's testimony, howev
that he saw the two roof bolters standing outside the protection furnish
by the machine. According to the operator's witnesses, the bouncing whi
affected the entryway width had also widened room 8, leaving sloughage,
causing them to clean up the outer corner of the room before the bolter
could be positioned in the room. A subsequent bounce caused them to pul
the bolter out because of additional sloughage. According to both membe

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3/ As the testimony went forward, the inspector stressed the unsupporte
"corner" of the entryway which the subject of citation 789250 and room 8
which is the subject of citation 789251. The inspector appeared unclear
to which citation covered the corner. It appears to be mentioned in both
citations. For the purposes of this decision it makes little difference
but I specifically hold that the unsupported area on the corner was more
properly covered in the initial citation since additional timbers were
installed there rather than additional bolts (Tr. 96, 115-117). This w
the method of correction selected by the operator for the areas between
rooms 7 and 8.

4/ As pertinent, the citation and withdrawal order read:

The approved roof control plan was not complied with in the No. 8 r
of the 5th east section as Larry West and Larry Rogers, roof bolters, we
observed installing roof bolts to the left and right of the outer contac
point of the ATRS system was [sic] 9 feet and 10 feet to the rib, and
temporary roof supports were not installed, the entry width was 27 feet.
The No. 8 roof where roof bolting was being done. [Technically this sec
action may be classifiable simply as a withdrawal order, but is describe
in this decision as a citation since the parties routinely referred to i
as such in the pleadings, trial and briefs.]

system (Tr. 121, 126, 130). According to the bolters, had they not been interrupted by the inspector, they would have installed the center bolts, would then have backed the machine, moved it back in at a different angle and then proceeded to set the outer bolts on one side. This procedure would have been repeated to bolt the other side. The two men admitted th they could have swung the booms on the bolter out beyond the protection o the ATRS to bolt nearer the rib, but asserted they did not do so. They maintained that that procedure was never followed if the distance betwee the edge of the ATRS and the rib line exceeded five feet (Tr. 128, 136). Westmoreland's safety coordinator and its underground supervisor, both of whom were present during this phase of the inspection, claimed that neith bolter stepped outside the ATRS system (Tr. 88, 98). The second of these witnesses also stated that neither during the inspection nor the closing conference did the inspector mention that bolters were beyond the protection of the ATRS.

The only issue here is whether the bolters, or either of them, were outside the protection afforded by the ATRS system.5/ For the reasons which follow, I hold they were not. First, I am somewhat impressed by th uniformity of the testimony of the four Westmoreland witnesses on this issue. Ordinarily, the testimony of that many witnesses will reveal some inconsistency. Of far greater importance, however, were certain weakness in the inspector's testimony.

The inspector testified with particularity concerning where he saw t two bolters, marking their positions on exhibit 3, and claiming with certitude that both were standing on the mine floor while operating the bolter (Tr. 147, 154-156). That all of the operator's witnesses testifie to the contrary does not necessarily carry the day for Westmoreland; credibility may not be measured by a mere witness count. The content of

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5/ At one point the inspector testified that he should have issued two citations: one for the breadth of the unsupported roof, another for the presence of the men outside the ATRS (Tr. 30). During the inspection he required that the men leave the machine and set temporary supports (Tr. 30). But he later clarified his position, stating that no violation wou have occurred had the men remained under the ATRS (Tr. 52-54).

cannot be reached from floor level (Tr. 127, 128, 163). Westmorel underground supervisor likewise insisted that ground operation was impossible with this machine (Tr. 159). I believe it unlikely tha witnesses would have testified untruthfully on so easily verifiabl matter. I consequently accept Westmoreland's version of the facts the inspector was mistaken. The bolters were within the protectio ATRS system, and no violation occurred. Citation 789251 and the a companying withdrawal order will therefore be vacated.

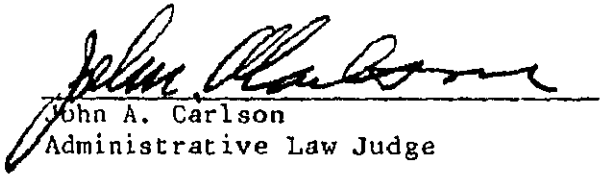
ORDER

In accordance with the findings and conclusions contained in narrative portion of this decision:

(1). Citation 789250 docketed as WEST 81-240-R is ORDERED va

(2). Citation and withdrawal order 789251 docketed as WEST 8 is ORDERED vacated, and

(3) These consolidated proceedings are dismissed.



John A. Carlson
Administrative Law Judge

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FEB 3 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 81-192 A.O. No. 15-05120-03027A
v.	:	Ken No. 4 North Mine
ERNIE BROCK, Respondent	:	

ORDER DISMISSING PROCEEDING

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on September 22, 1981, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c). The proposal seeks a civil penalty assessmen in the amount of $300 against the respondent for an alleged violation of mandatory safety standard 30 CFR 75.200. 1/ The alleged violation is based on certain conditions and practices detailed in an imminent danger order no. 0795972 issued pursuant to section 107(a) - 104(a) of the Act on May 21, 1979. The order was issued to Peabody Coal Company for the alleged violation which petitioner asserts took place at the above captioned mine, and petitioner asserts that the named respondent in this case was employed at the mine as a foreman. Petitior further alleges that on or about May 21, 1979, and for a period of approximately one week prior thereto, respondent, acting as an agent of Peabody Coal Company, knowingly authorized, ordered, or carried out Peabody's violation of the cited section(s).

Respondent filed his answer to the proposal on October 7, 1981, denying any violation of section 110(c) on his part. He does admit to the fact that the mine is subject to the Act, that he was employed

1/ Although the proposal filed by the petitioner makes reference to section 75.200, a copy of the supporting citation attached to petitioner proposal reflects that the "part and section" cited by the inspector was changed from section 75.200 to section 75.202.

By motion filed January 20, 1982, respondent's counsel moves dismissal of this case on the grounds that the respondent has bee prejudiced by the extreme delay between the time the citation was on May 21, 1979, and the service of MSHA's proposed civil penalty on the respondent on July 20, 1981. In support of the motion to counsel states that after the citation was issued, Peabody Coal C filed an application for review of the citation and an expedited was held on this application on June 13-14, 1979. Counsel furthe that respondent Brock testified in Peabody's behalf at the hearin while Peabody was represented by counsel, respondent Brock was no as he had not been charged with any violation. Since Mr. Brock t to the events surrounding the issuance of the citation, counsel m that his participation in those events has been well-known to MSH since at least June 13-14, 1979.

In further support of his motion, respondent's counsel point the fact that when MSHA served its proposed assessment on the res July 20, 1981, more than two years had passed since the citation issued and since the hearing where all the facts surrounding the in question were laid open to MSHA. Since it is now January, 198 some three years after the citation issued, counsel asserts that delay in bringing this case is completely inexcusable and inheren prejudicial to the respondent.

In support of the claim of prejudice, respondent's counsel s that the Ken No. 4 North Mine last produced coal on October 12, 1 Its entrance has been sealed since November 19, 1979. All reclam activities associated with this mine, including covering the mine with earthen material, has been concluded since January, 1980, an until a year and a half following closure and sealing of this min passed did MSHA propose to assess a penalty against respondent Br The sealing of the mine is supported by an affidavit by Peabody's President of Underground Operations, Eastern Division, Henderson,

With regard to the instant case filed against the respondent counsel states that the condition of the roof in the mine in ques would be the central issue to be resolved in this penalty proceed Since the mine is available to no one, and since the evidence "ha been literally covered up", counsel maintains that a proper defen cannot be prepared on respondent Brock's behalf, and he attribute this to MSHA's excessive delay in bringing this case. Counsel ma that the prejudice test established by the Commission in Secretar v. Salt Lake County Road Department, Docket No. WEST 79-365-M (Ju and reiterated in Secretary of Labor v. The Anaconda Company, Doc WEST 81-94-M (August 13, 1981), is well met in the instant case, MSHA's delay is in blatant disregard of the "reasonable notice" p visions of the Act and respondent Brock has been prejudiced there

that it has determined that there is insufficient evidence to prove case and moves for an order approving withdrawal of its civil penalt proposal.

Petitioner's motion to withdraw its proposal for assessment of civil penalty on the ground that there is insufficient evidence to prove its case is DENIED. The matter concerning the sufficiency of evidence is a judgment that petitioner should have made before filin its case in the first place and before subjecting the respondent to prosecution under section 110(c).

Respondent's motion to dismiss on the ground that MSHA's delay has prejudiced his opportunity to reasonably prepare and present a defense is GRANTED, and this case IS DISMISSED WITH PREJUDICE.

George A. Koutras
Administrative Law Judge

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FEB 3 1982

SECRETARY OF LABOR,	:	Complaint of Discharge, Discrimination, or Interference
On behalf of JOHN GRIFFIN,	:	Docket No. LAKE 81-159-D
Complainant	:	
v.	:	Baldwin No. 1 Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., and Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, for Complainant;
Thomas R. Gallagher, Esq., St. Louis, Missouri, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves a claim by John Griffin, an employee of Respondent, that he was suspended for 3 days without pay for an incident on December 20, 1980, which he alleges was activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The case was heard in St. Louis, Missouri on October 20, 1981 and in Falls Church, Virginia on December 15, 1981. John Griffin, William Pillers, Leonard Krantz, Doug Rushing, Daniel Seiver and Arthur Grigg testified for Complainant; John Laughland, John Hull, Martin Sommer, Darryl Kirkman and Thomas Zweigart testified for Respondent. Both parties have filed posthearing briefs. Having considered the record and the contentions of the parties, I make the following decision:

FINDINGS OF FACT

1. Complainant John Griffin was at all times pertinent to this proceeding employed by Respondent as a miner, more specifically as a repairman.

3. John Griffin was assigned to work with Zweigart's unit. Up receiving the assignment, he passed a remark indicating that he intended to disrupt activities in Zweigart's unit.

4. Griffin rode in a mantrip to the face area with the unit cr

5. The area had been heavily rock dusted before the crew arriv and considerable dust remained in the air.

6. After foreman Zweigart checked the face areas, the crew wen up to the faces where the air was relatively clear. Zweigart decide to ventilate the section and purge it from dust and at the same time move the continuous miner into the next room to get it ready for producing coal.

7. In order to energize the miner, Zeigart instructed Griffin turn the power on to the unit. It was customary for the repairman assigned to a production unit to turn on the power.

8. Griffin refused to turn on the power stating that it wasn't safe because of the dust. He later stated that the dust made it impossible for him to inspect the cables which he felt should be don before energizing the unit.

9. In the mine in question it was not customary for the repair to inspect the cables before turning on the power to the unit. Each equipment operator inspected the cable to his own piece of equipment and notified the repairman of any defects.

10. Griffin later stated that the dust concentration made it difficult to breathe and unhealthy to walk to the transformer to tur on the power.

11. Foreman Zweigart then ordered Griffin to turn on the power and when he refused, Zweigart called the mine manager, John Laughlan Laughland asked about the dust and instructed Zweigart to order Grif again to turn on the power. When he refused, Laughland instructed Zweigart to have Griffin removed from the mine and turn on the power himself, which Zweigart did.

12. The Mine Superintendent John Hull was informed of the incident and he prepared a written 5-day suspension with intent to discharge. Hull and Laughland met Griffin inside the mine. Griffin admitted that he was wrong and that he should have turned on the power. He requested that the disciplinary action be reduced to a 3-day suspension. Because he admitted his error, Hull changed the letter to show a 3-day suspension.

2. If the answer to the previous question is in the affirmative, what remedy should be awarded?

DISCUSSION WITH CONCLUSIONS OF LAW

In the case of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001, the Commission held that refusal to work in conditions believed to be unsafe or unhealthful is protected activity under the Act. It further held that a prima facie case of a violation of section 105(c)(1) is made out if it is shown that the adverse action complained of was motivated in any part by the protected activity. The employer may affirmatively defend by showing that he would have taken the adverse action for unprotected activity alone. In the case of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 812, 2 BNA MSHC 1213, it was further held that refusal to work is protected if the miner "ha[s] a good faith, reasonable belief in a hazardous condition."

The record here shows that there was excessive rock dust in the air at the time and place involved in this case. It further shows, however, that the section foreman did not intend to begin production prior to clearing the air. He ordered the power turned on in order to move the miner and intended to clear the air and ventilate the unit while the miner was being readied.

Based on all of the testimony, I conclude that Complainant did not refuse to perform work because of a good faith belief that doing so threatened his health or safety. I find that the reason Complainant gave for his refusal was in fact a sham. My conclusion is based on my observing Complainant's demeanor on the witness stand as well as the answers he gave. I credit the testimony of Martin Sommer and Darryl Kirkman concerning Complainant's remarks when he was assigned to the section. I generally credit the testimony of John Hull and John Laughland concerning the issuance of the disciplinary suspension, and decline to credit Complainant's version of this occurrence. I conclude that Complainant deliberately attempted to disrupt the activities of the section in the hope that he might obtain time off. The dust in the atmosphere and its alleged relation to health and safety was used as a pretext.

Since a good faith believe in the existence of a health or safety hazard is required to find protected activity, it is unnecessary to discuss other aspects of the Pasula test.

ORDER

Based upon the above findings of fact and conclusions of law, the above proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEB 3 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-379
	:	A.O. No. 46-01397-03098V
v.	:	DeHue Mine
YOUNGSTOWN MINES CORP., Respondent	:	

DECISION

Appearances: David Bush, Attorney, U.S. Department of Labor, Philade Pennsylvania, for the petitioner; Roger S. Matthews, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

The proceeding concerns a proposal for assessment of civil penal filed by the petitioner against the respondent pursuant to section 11 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation of mandatory safet standard 30 CFR 75.400. Respondent filed a timely answer in the proceedings and a hearing regarding the petitions was held on Novembe 1981, in Charleston, West Virginia, and the parties appeared and participated therein.

Issues

The principal issues presented in this proceeding are (1) whethe respondent has violated the provisions of the Act and implementing re as alleged in the proposal for assessment of civil penalty filed in t proceeding, and, if so, (2) the appropriate civil penalty that should assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issu raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section

bility to continue in business, (5) the gravity of the violation, nd (6) the demonstrated good faith of the operator in attempting to chieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 0 U.S.C. § 801 et seq.

2. Section 110(i) of the 1077 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

tipulations

The parties stipulated to the following:

1. Respondent Youngstown Mines Corporation owns and operates the mine in question.

2. Respondent is engaged in the business of extracting coal.

3. The inspector who issued the citation in this case is a duly authorized representative of the Secretary of Labor.

4. The DeHue Mine is subject to the provisions of the 1977 Federal Mine Safety and Health Act.

5. The presiding administrative law judge has jurisdiction to hear and decide this case.

6. The citation at issue in this case was duly served on a representative of the respondent and it may be admitted in evidence.

7. An appropriate civil penalty in this case will not adversely affect respondent's ability to remain in business.

8. Respondent's 1980 annual coal production was 259,001 tons.

9. Respondent's history of prior assessed violations for the 13 month period preceding the issuance of the citation in issue in this case consists of 501 citations.

Discussion

Citation 912344, 8/26/80, 30 CFR 75.400, states as follows:

Petitioner's Testimony and Evidence

MSHA Inspector Ernest Mooney, confirmed that he inspected the mine in question on August 26, 1980, and issued the citation charging the respondent with a violation of mandatory safety standard 75.400. He identified copies of the citation, the abatement, and his inspector "narrative statement" which he filled out (Exhibit P-1). He testified that the area where the citation issued was an active working section and confirmed that he measured the coal accumulations inside the continuous miner motor compartment with a standard ruler and that the accumulations were "real black". He determined that the miner machine was "hot" after opening the compartment and detecting heat coming out of it, but he did not touch the hot machine. Section Foreman Cook was with him at the time of the inspection, and someone told him that the machine had been operated during the immediate previous shift, but he could not recall who told him and he took no notes other than to write up the citation.

Inspector Mooney testified that he believed the coal accumulation which he cited had accumulated on the machine during previous shifts a did not believe that they had "just occurred" shortly before his arriv on the scene. The applicable accumulations clean-up plan required cle "when needed", and he believed that mine management should have been aware of the accumulations because each working shift in the mine has a shift supervisor present. Although Mr. Mooney stated that the section foreman may have informed him that the machine in question may have "been down", since he took no notes he could not confirm this fac The citation was abated on August 27, 1980 by another inspector.

On cross-examination, Inspector Mooney stated that he left the mi surface on August 26 at approximately 7:00 a.m., but was underground w he issued the citation. The miner machine was backed away from the working face and appeared to be located just outby the last open cross The face in question was the only working face on the section, and whi he observed the machine operator at the miner he could not recall what he was doing. Although the machine was not energized, power was on th trailing cable and the lights were on, but the motor was not running. He indicated that the machine has protective shields over the motor and cables, and he inspected both sides of the machine and detected that the shield on the operator's side of the machine was missing. The shields are usually installed on hinges so that they can be readil raised to facilitate cleaning and inspection of the motor and cables, he did not know how many shields are required to be on the machine.

oil and grease in the motor compartment near the pump motor. He could not recall whether anyone said anything to him about any mechanical problems with the machine and he made no inquiries as to why the machine had been backed away from the fact. The machine was removed from service, and he remained on the section.

Inspector Mooney confirmed that at the time he observed the machine coal was not being mined. He indicated that the mine operated on three daily 8-hour shifts and that issued the citation on the second shift which was from 4 p.m. to 12 midnight. At the time that he issued the citation he believed that the miner had been used to mine coal at the face during the preceding shift, and he stated that had the operator been in the process of cleaning the machine at the time he observed it he would not have issued the citation. It was his belief that the machine needed cleaning, and that he issued the citation because of the presence of the accumulations which he found and the fact that cleaning had not been done. (Tr. 15-60).

Respondent's Testimony and Evidence

Paul Cook, presently employed by the respondent as an assistant mine foreman, testified that at the time the citation was issued by Inspector Mooney, he was employed as the section foreman. His previous experience with the respondent includes service as a UMWA miner, member of the safety department, and section boss. Mr. Cook stated that on the day the citation issued he arrived on the section at approximately 4:30 p.m., and that the previous shift foreman advised him that the continuous miner which was cited by Mr. Mooney had a leaky hydraulic hose on the "off-side". The machine was located just outby the last open break, and after checking the faces Mr. Cook turned the machine power on to see what the problem was. The motor ran for approximately 5 to 10 seconds when he detected hydraulic oil spurting out of a two-inch return line which had burst. Since the miner could not be operated without any hydraulic oil, he assigned the miner operator and his helper to the job of cleaning up the miner and he observed one shield missing from the motor panel at the location where the hose had burst. Mr. Cook stated that the miner and his helper were cleaning the oil accumulations around the motor area so that an electrician could have access to the area to change out the hose which had broken.

Mr. Cook testified that after directing that the machine be cleaned up he telephoned for a replacement hose for the machine and as he left the area he encountered Inspector Mooney. He informed Mr. Mooney that the machine "was down" and Mr. Mooney placed a red closure tag on it. Mr. Cook then called outside and ordered that a cleaning machine be brought in so that the machine could be cleaned up. He also indicated that the machine uses a fire-resistant white emulsion oil which contains

as long as the fire-resistant oil is used.

Mr. Cook identified a copy of the section foreman's repo which indicates that no coal was being loaded during the shif indicated that the mine operates two production shifts and tha shift is a maintenance shift. He confirmed that the miner was at 6 p.m., and he indicated that he was aware of the fact that Mooney had issued other citations during his inspection of Aug and that they were all signed as being issued at 7:30 p.m.

On cross-examination, Mr. Cook identified the previous sh as Arlie Bush and he stated that the miner machine in question operated at the face as of 3:30 p.m. on August 26. Mr. Cook d believe that the machine could have remained "hot" from that t 7:30 p.m. when the citation was issued by Mr. Mooney. Mr. Cook that the shift report (Exhibit R-1) was filled out after the is of the citation in question (Tr. 60-95).

Petitioner recalled Inspector Mooney in rebuttal, and he t that he is familiar with emulsion oil, but saw none sprayed all the miner on the day in question. In response to my questions, that he did not know whether the miner machine had a broken hos at the time he looked into the motor compartment the engine was running. He also indicated that due to the packing of the assu at a depth of some four inches inside the motor compartment, the no way that a broken miner hose used for one shift could have those accumulations over that one shift. He also did not believ all of the accumulations inside the machine could have occurred the immediate previous shift. When he first looked into the mac and observed the accumulations, the miner operator was present, he (Mooney) "tagged" the machine, he then encountered Mr. Cook (

On cross-examination, Mr. Mooney stated that the packed acc led him to believe that the coal was mixed with oil and that it in over a period of time. He conceded that he did not use the t "packed" or "compacted" in the citation or his inspector's state He also stated that had he observed only loose coal on the outsi the machine which had just been idled he would not issue a citati if he finds it inside the machine and there is an indication that accumulated, he would (Tr. 101-102). He explained that the machi question had not accumulated coal over the one shift but that it been left from one shift to another without being cleaned. Under clean-up plan, the machine should be cleaned "as needed" and that judgment is made by the section supervisor. In response to bench Mr. Mooney summed up the crux of the citation he issued as follow (Tr. 103-104):

of accumulation that had built up inside on the motor of the continuous miner had been a condition that existed for God knows how many previous shifts and nobody ever paid any attention to it, because it was accumulations of four inches.

I got the distinct impression from your testimony that it had been something that had been built up and built up and built up and caked on there combined with oil and what have you that made it adhere together and it was caked on there four inches. And when Mr. Cook discovered the broken hydraulic hose, he had to have his people go in and clean all that stuff off there before they could make repairs.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Is that what it is?

THE WITNESS: Yes.

JUDGE KOUTRAS: Now, the story I'm getting from Mr. Cook is no, that's not the case. The accumulations the inspector was talking about are something that just happened from the natural cutting action of the machine. "It happens all the time, Judge." Sure, he measured four inches. We have six inches, we have twelve inches while we're operating.

THE WITNESS: He had to remove the coal. What he was saying, I think, he had to remove the coal before he could repair the machine and the coal dust out of the compartment.

JUDGE KOUTRAS: How about this grease and oil, did you attribute that to something other than the oil leak when you looked at it?

THE WITNESS: No, sir, I thought that was over a period of time; really, I did.

JUDGE KOUTRAS: So, the grease and oil you're talking about in your citation is not the same hydraulic oil Mr. Cook is talking about?

THE WITNESS: No. You know, I didn't know about the busted hose, the burst hose.

Findings and Conclusions

Fact of Violation

of the fact that the Commission, in Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulat of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulat See also, MSHA v. C.C.C.-Pompey Coal Company, Inc., Docket No. PIKE 79-125 decided by the Commission on June 12, 1980, remanding the case to the judg to apply its holding in Old Ben.

In its post-hearing brief, petitioner argues that the testimony by the inspector, as well as the testimony of respondent's section foreman Cook supports the inspector's findings that accumulations of coal, coal dust, and grease and oil in the inner workings of the continuous miner in question did in fact exist at the time the inspector issued his citatio In addition, petitioner relies on the Commission's decision in Secretary of Labor v. Old Ben Coal Company, 2 MSHC 1017 (1979), and Secretary of Lab v. C.C.C.-Pompey Coal Company, Docket No. PIKE 79-125-P, decided by the Commission on June 12, 1980, remanded to Judge Steffey for application of the principles set forth in Old Ben.

Petitioner asserts that the fact that the continuous miner may have been out of service makes no difference since the standard simply prohibits accumulations on electrical equipment and there is no requiremen that such electrical equipment be in service or even energized. Even so, on the facts in this case, petitioner asserts that the continuous miner trailing cable had power and that the lights were on. In addition, petiti points to the fact that even accepting the testimony of foreman Cook that the machine had a broken hose, Inspector Mooney tagged it out and took it out of service when he looked inside the machine and found the accumulations which he cited, and that the inspector took it out of service because in his judgment it needed to be cleaned.

In its post-hearing brief, respondent cites the cases of Ziegler Coal Company, 3 IBMA 366 (1974), and Plateau Mining Company, 2 IBMA 303 (1973), in support of its argument that citations should be issued for accumulations of oil and grease on a piece of equipment which had been taken out of service and was being cleaned at the time the violation is cited. Even though the continuous mining machine in the instant case may have been defective because of the presence of accumulations of grease and coal, respondent maintains that it has demonstrated by a preponderance of the evidence that the miner was under repair (being cleaned), and in support of this conclusion respondent relies on the testimony of Mr. Cook as well as his shift report (Exhibit R-1).

ection 75.400 is to prevent coal accumulations which are left from shift
o shift without being cleaned up, respondent nonetheless maintains that
n this case the miner was down and being cleaned at the time the inspector
bserved it. Citing the testimony of section foreman Cook, respondent
aintains that he had a clearer recollection of the events in question
han did Inspector Mooney.

Respondent's reliance on the Ziegler and Plateau decisions by the
ormer Board of Mine Operations Appeals as a defense to the citation issued
n this case is rejected. Those cases dealt with withdrawal orders
ssued by mine inspectors for defective equipment. In the instant case,
he respondent is charged with a violation of section 75.400, which deals
ith accumulations of combustible materials and not with a citation
or any defects in the machine. I conclude and find that the Commission's
ecisions in Old Ben and C.C.C.-Pompey Coal Company are controlling and
pplicable to the facts presented in this case. In Old Ben, while the
ommission accepted the fact some spillage of combusbitle materials
ay be inevitable in mining operations, it also found that an accumulation
f such materials were in fact present and did exist in that case and
hat the mine operator did not dispute those facts.

I accept the testimony of Inspector Mooney that he tagged the
achine out after finding the accumulations of coal, coal dust, grease
nd oil caked around the engine compartment, and I conclude and find that
nspector Mooney took that course of action because of the accumulations
nd not because of any broken hose. Although a broken hose may have
ontributed to the caking of the accumulations, the amounts measured by
r. Mooney reasonably support an inference that the accumulated
ombustible materials had been permitted to exist for at least several
orking shifts prior to his inspection. In this case, while the record
eflects that the shift foreman prior to Mr. Cook's shift purportedly
old Mr. Cook about a defective hydraulic hose on the "off-side" of the
achine, and the machine operator was at or near the machine when the
nspector looked into the motor compartment, neither of these individuals
ere produced by the respondent at the hearing to testify. Although
r. Cook's "foreman's report", exhibit R-1, reflects that the miner machine
as down at the start of his shift from 4:30 to 6:00 p.m. because of a
broken suction hose", it also reflects that it was "still down" from
:00 to 11:15 p.m., because the inspector believed it needed cleaning.
s correctly pointed out by petitioner in its brief, Mr. Cook's report
as filled in after the fact, and the previous shift foreman was not
alled to substantiate any claims by the respondent that the miner had
een idled during the day shift because of any broken hose.

After careful review and consideration of all of the testimony and
vidence adduced in this case, I conclude and find that the petitioner
as the better part of the argument and that it has proved a violation

The parties stipulated that the assessment of an appropriate civil penalty in this case will not adversely affect the respondent's ability to remain in business, and I adopt this as my finding in this case. With regard to the respondent's size of business, the parties stipulated that respondent's annual 1980 coal production was approximately 259,001 tons, and I consider this to be a medium size mining operation.

In its post-hearing brief, petitioner's counsel argues that I should consider the annual production tonnage of 3,258,781 for the Youngstown Mine Corporation, the parent company, in any determination of the size of the respondent. This argument is rejected. Petitioner stipulated to respondent's annual production during the relevant time period and counsel specifically stated at the hearing that he was in agreement that an annual production of 259,000 would place the mine in the small or medium range (Tr. 7).

Good Faith Compliance

The record reflects that respondent took immediate steps to abate the citation and to assign men to clean the accumulations from inside the miner in question. This is indicative of rapid good faith compliance on respondent's part and that fact is reflected in the civil penalty which I have assessed for the citation in question.

Gravity

Although I consider accumulations of combustible materials on electrical machines or components to be serious matters, on the facts presented in this case the gravity of the conditions cited is tempered somewhat by the fact that the miner machine was not in operation and that coal was not being mined. In addition, petitioner has not rebutted the testimony by the respondent that the fire resistant emulsion oil used in the miner does afford some protection against any possible fire. Under the circumstances I conclude that the gravity connected with this citation was low.

Negligence

Since I have concluded that the accumulations cited by the inspector were permitted to exist over a period of time, I must also conclude that the respondent was negligent for failure to exercise reasonable care to correct the condition resulting in the violation. Accordingly, I find that the violation resulted from respondent's ordinary negligence.

History of Prior Violations

The parties stipulated that for the 13-month period prior to

violations over a span of 15 months is not a good compliance record. Accordingly, this reflected in the penalty assessment made by me in this case.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taki into account the requirements of section 110(i) of the Act, I conclud and find that a civil penalty assessment in the amount of $1,000 is reasonable and appropriate for the citation which I have affirmed, an respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this case is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEB

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 81-380 A.O. No. 46-01407-03091V
v.	:	Olga Mine
OLGA COAL COMPANY, Respondent	:	

DECISION

Appearances: David Bush, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner; Roge Matthews, Esquire, Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil p filed by the petitioner against the respondent pursuant to section of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a charging the respondent with one alleged violation of mandatory sa standard 30 C.F.R. 75.400. Respondent filed a timely answer in th proceedings and a hearing was held on November 17, 1981, in Charle West Virginia, and the parties appeared and participated therein.

Issues

The principal issues presented in this proceeding are (1) whe respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil pena filed in this proceeding, and, if so, (2) the appropriate civil pe that should be assessed against the respondent for the alleged vio based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, secti 110(i) of the Act requires consideration of the following criteria (1) the operator's history of previous violations, (2) the appropr

(6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. & 2700.1 et seq.

Discussion

Citation 0655868, 12/29/80, 30 CFR 75.400, states as follows:

> 3 West 034 Section - Loose dry coal was allowed to accumulate along the active shuttle car haul road beginning at the loading ramp and extending inby for a distance of approximately 200 feet. The coal measured from 4 to 12 inches in depth.

Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Aubrey T. Castanon testified as to his background and confirmed that he conducted an inspection at the mine in question on December 29, 1980, and that he issued Citation 0655868 after finding accumulations of dry loose coal and coal fines in the 3 west section beginning at the ramp loading point and extending inby to the pillar block which was being mined. He measured the accumulations with a standa ryler and they ranged from four to twelve inches in depth (Exhibit P-1, Tr. 6-9). He took notes of the conditions he observed, and stated that during the inspection he discussed the conditions cited with respondent's mine safety inspector Jim Baylor, and his notes reflect that Mr. Baylor could not understand "why the dayshift left the roadway in the shape it is in" (Tr. 11).

Inspector Castanon identified a copy of his inspector's statement which he filled out at the time he issued the citation and he confirmed that the roadway which he cited was an active working area of the mine. He believed that mine management was negligent because the area where the accumulations were found was the only roadway from the ramp to the pillar being mined and that the conditions should have been obvious to the section foreman or pre-shift examiner walking the area (Tr. 12). Mr. Castanon stated further that at the time he observed the conditions the shift had begun and eight men were working in the section. He believed the accumulations of coal presented a possible fire hazard, and energized shuttle car cables would be lying in the roadways where the accumulations

the citation and the abatement efforts were confirmed by company safety inspector Aaron Charles. Since the abatement took approximately 11 hour Mr. Castanon believed the coal accumulations were extensive. Mr. Castar stated that mine management representatives, including the mine superint and foreman, discussed the matter with him during the abatement process and that Mr. Baylor advised him that he had been on the section during t previous day shift, had noticed the accumulations and had instructed the evening shift section foreman to back the continuous mine up to the ramp and to clean the roadway but that this had not been done at the tim he arrived on the section. He also stated that Mr. Baylor had agreed with his decision to issue the citation and that his notes confirm this fact (Tr. 17-18).

On cross-examination, Inspector Castanon confirmed that the mine in question operated on three shifts; namely, the "hoot-owl" shift from 11:00 p.m. to 7:00 a.m., the day shift from 7 to 3 p.m., and the evening shift from 3 p.m. to 11 p.m. He confirmed that he observed someone arou the ramp area when he first arrived on the section the day of his inspec and that the person was "just sitting" (Tr. 24). He could recall no one shovelling coal or cleaning in the area. He did recall some indivic working around the continuous miner which was facing towards the face, but he could not recall what the individuals were doing (Tr. 26-27). He also observed a shuttle car parked at the ramp area facing south, and a second shuttle car parked at the first check curtain to the east of the ramp area (Tr. 29). He confirmed the fact that he went to the face area to observe the roof conditions, and later came back and issued the coal accumulations citation after looking over the area and making his measurements (Tr. 30). The deepest accumulations consisting of 12 inche were present at the ramp area, and the four inches were measured along the remaining area for approximately 200 feet continuously from the ramp to the split of the two blocks of coal, outby the area where the miner was parked and towards the face (Tr. 32).

Mr. Castanon testified that a citation was issued on the continuc miner, and he vaguely recalled being told that the miner machine was bro down (Tr. 34). However, his notes do not reflect any details concernin the breakdown of the machine. He stated that the usual method of clean accumulations in the mine was by means of scoops, but he could not state whether this was the means used in this case since he had not been at th mine for some time (Tr. 35). Had he observed cleaning in process with of a continuous mining machine only, he would still have issued a citat because he does not believe that a mining machine can do an adequate clean-up job because of the fact that the machine pan cannot clean up th middle of the roadway. The ramp area must be cleaned by shovel and the continuous miner could not adequately clean the ramp and the accumulati were continually being run over and packed down by the machine (Tr. 35-

stated that the cleanup program required that accumulations be cleaned as needed and reiterated his belief that the day shift and evening ift foremen should have been aware of the accumulations which he found, d he could not recall being told that the miner was parked by the ramp facilitate clean-up (Tr. 40).

On redirect, Mr. Castanon testified that he saw no evidence of anyone eaning up when he arrived on the section, and had he observed clean-up king place he would not have issued a citation (Tr. 41-42). He also lieved that the accumulations had occurred over more than two shifts r. 43).

In response to bench questions, Mr. Castanon conceded that had the ntinuous mining machine been in the process of cleaning the roadway en they arrived on the scene, he would still have issued the citation cause the machine pan could not reach the mine floor and when the spondent attempted to use it for clean up it was riding on the top of e coal and could not reach down far enough to clean up the accumulations ng on the raodway (Tr. 50). He reiterated that he issued the citation cause of the presence of coal accumulations and the fact that the spondent allowed them to exist without making any effort to clean them (Tr. 53).

In response to bench questions, Inspector Castanon stated that he served no splices in the cables which were present in the area of the cumulations and that while he was present during the abatement three ittle cars of coal were cleaned up from the roadway but little from e ramp. He also stated that the accumulations were black and he believed ey resulted from overloading of the shuttle cars over a period of time r. 54-55).

spondent's Testimony and Evidence

Harry Litteral testified that he was the 3 West second shift vening) section shift foreman on December 29, 1980, when the tation was issued by Inspector Castanon. At the beginning of the shift had a discussion with the previous shift foreman, Arthur Christian, who vised him that coal was beginning to accumulate on the shuttlecar ulway, that the number one pillar needed to be "broken off", and that ditional dusting was needed. The mine superintendent instructed him back the continuous mining machine to the ramp and to begin cleaning e coal accumulations. However, after discovering that the No. 1 pillar as working", he decided to break it off and to install timbers for roof pport to keep the roof from "riding back" to where coal would have to mined. He then moved the miner out so that the shuttlecar could travel the ramp to obtain roof support supplies. He then encountered a oken water hose on the miner water sprays and he proceeded to make

repair the water hose break. Mr. James Baylor was with the inspector, and Mr. Baylor advised him that the miner was dirty and needed cleaning. Mr. Litteral then assigned a man to clean the machine and advis Inspector Castanon that he had no intention of loading coal until the roadways were cleaned up. While clean up of the roadway was in progress, the inspector advised him that it was not doing the job, and clean up then continued by hand. Mr. Littral conceded that the miner pan will not clean the entire roadway if it elevated and shovels must be used (Tr. 66-67).

Mr. Litteral stated that coal was loaded out only for clean up during his shift and when he returned the next day the citation was abated. He believed that rib sloughing contributed to the accumulations, and that spillage does occur when the shuttle cars are "too heavy" (Tr. 69). He indicated that the coal was soft that the movement of the shuttle car around the corner by the ramp, and the cable moving about contributed to the dispersement of the coal accumulations on the roadway (Tr. 70). No coal was mined during the shift and he intended to clean up first before beginning to mine coal (Tr. 71). He also stated that he assigned men to clean and rock dust and identified a copy of the mine cleanup program (Exhibit R-3). He stated that numbered paragraph four of the pl was the applicable procedure for cleaning the shuttlecar roadway in ques (Tr. 73).

On cross-examination, Mr. Litteral confirmed that the previous shift foreman had informed him that coal was beginning to accumulate on the shuttlecar roadway and that the accumulations extended for the approximate 200 foot distance as stated by Inspector Castanon (Tr. 74). He also conceded that the accumulations could not have occurred between his shift and the previous shift. He also reiterated that rib sloughin was a constant problem and that this would account for coal accumulation in the roadway and the cleanup program requires daily attention to clean up and that "you work on it all the time" (Tr. 76). Road bottom conditions dictate whether the accumulations can effectively be cleaned by use of the miner machine and a scoop might be better since it has a sharper blade (Tr. 77).

James Baylor testified that at the time the citation issued he was employed at the mine as a safety assistant and that he accompanied Inspector Castanon during his inspection. Mr. Baylor stated that while on the section he encountered section foreman Litteral and advised him that he needed to clean up coal accumulations on the continuous miner. Inspector Castanon was in the area inspecting the faces and the roadway. He then decided to issue the citation for coal accumulations and at that point in time Mr. Baylor advised the shift foreman that the citation had issued and he assigned additional men to clean them up (Tr. 89).

and the accumulations were shovelled into shuttle cars (Tr. 90). Mr. Baylor did not see accumulations to the depth of a foot, and he indica that rib sloughing does cause accumulations at the base of the rib. He observed the accumulations in the roadway and indicated that they were caused by the shuttle cars driving on the roadway and the slack cable that moves about as the shuttle cars travel the roadway. He observed no one pulling down or cleaning up the coal ribs and he explained that this could not be done because it would widen the width of the roadway and cause roof control problems (Tr. 91-93).

On cross-examination, Mr. Baylor confirmed that he told Inspector Castanon that he could not understand why the day shift left the accumulat on the roadway, and he conceded that it was unusual for the shift to be left in such a condition (Tr. 94). He admitted that it "was in bad shape" but denied that there were 12 inches of coal accumulations all along the roadway, but he did not question that 12 inches were present near the anchoring point of the shuttle car trailing cable (Tr. 95). Mr. Baylor took no measurements of the accumulations and he could not recall whether he was present when the inspector made his measurements. Although Mr. Baylor stated that he took notes, he did not have them with him at the hearing (Tr. 96).

Findings and Conclusions

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. Olga Coal Company owns and operates the Olga Mine.

2. Olga Coal Company is involved in the extraction of raw coal from its natural deposits in its operation at the Olga Mine.

3. Inspector Aubrey T. Castanon was at all times relative thereto an authorized representative of the Secretary of Labor.

4. Olga Coal Company and the Olga Mine is subject to the Mine Safety and Health Act of 1977.

5. The Administrative Law Judge has jurisdiction over these proceedings.

6. The subject citation and termination thereof were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Olga Coal Company at the dates, times and places stated therein and may be admitted into

8. The appropriateness of the civil penalty, if any, to the coal operator's business should be based on the fact that in 1980 the company had an annual tonnage of eight hundred thousand twenty (800,020) production tons and Olga Mine had an annual tonnage of five hundred ninety-eight thousand seven hundred ten (598,710) production tons.

9. In the twenty-four month period prior to the issuance of the subject citation, the operator had a history of five hundres thirty-six assessed violations.

Fact of Violation

Respondent is charged with a violation of the provisions of 30 C.F.R. § 75.400, which provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

In its post-hearing brief, petitioner argues that the testimony of the inspector who issued the violation, as well as the testimony of the section foreman and respondent's safety assistant, support the fact that the cited accumulations did in fact exist as detailed by the inspecto both in his testimony and the citation which he issued, and relying on the decision by the Commission in the case of Secretary of Labor v. Old Ben Coal Company, 1 MSHC 2241-2243, petitioner asserts that the citati should be affirmed.

In its post-hearing brief, respondent takes the position that a literal application of section 75.400 would in effect prohibit all underground coal mining since spillage and collection of coal left in shuttle cars and mine cars between turns and during work stoppages would all technically be violations of the standard. Respondent maintains that the intent of section 75.400 is to prohibit combustible materials from accumulating in certain areas of the mine shift to shift without any effort being made to clean them up. This being the case, respondent argue further that the active workings are by their very nature clean, being cleaned, or in the process of accumulating combustible materials.

In this case, the respondent's defense is bottomed on an assertion that the inspector could not estimate how long it took to accumulate the amount of materials which he cited, and that the respondent was in the process of taking remedial action to clean up any accumulations that existed in the areas in question. Further, respondent maintains that it was its intention to clean up the haul road and ramp raea before

standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also, MSHA v. C.C.C.-Pompey Coal Company, Inc., Docket No. PIKE 79-125-P, decided by the Commission on June 12, 1980, remanding the case to the judge to apply its holding in Old Ben.

Turning to the evidence and testimony adduced in this case, I conclude and find that the preponderance of the evidence establishes the existence of the accumulations of loose dry coal and coal fines as described by the inspector along the haulage road and ramp area in questic The detailed testimony by the inspector, supported by his notes and the measurements he took to support the citation more than adequately establis the conditions he described both on the face of his citation as well as in his testimony during the hearing. The inspector's testimony that approximately three shuttle cars of coal were loaded out during the abatement process which took approximately 11 hours is indicative of the fact that the accumulations were rather extensive. Further, even though the inspector had no precise idea as to how long the accumulations were there, he believed that they existed for over two shifts and he saw no clean-up taking place at the time of his inspection. As stated during the hearing, the inspector issued the citation after finding accumulations of coal which he believed were permitted to exist without any efforts at cleaning them up (Tr. 53).

In view of the foregoing, I conclude and find that petitioner has established the fact of violation in this case, and I accept its arguments in support of the citation, and reject the arguments advanced by the respondent in its defense. The citation is AFFIRMED.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business.

The parties stipulated that the assessment of an appropriate civil penalty in this case will not adversely affect the respondent's ability to remain in business, and I adopt this as my finding in this case. With regard to the respondent's size of business, the parties stipulated that respondent's annual coal production was approximately 598,710 tons, and I consider this to be a medium-to-large size mining operation.

Good Faith Compliance

The record reflects that the inspector fixed the initial abatement time as twelve noon on December 31, 1981, but the termination notice

this case.

Negligence

The extent of the accumulations which the inspector found in t case suggests more than just a "beginning" of accumulations on the road and ramp as argued by the respondent in its brief. In additi on the facts of this case, I reject respondent's attempt to defend existence of the accumulations on the basis of the language found clean-up program which states that accumulations on each shift nee be cleaned up "if needed". In my view, the "need" for clean-up ha long passed by the time the inspector arrived on the scene and iss his citation. I accept the inspector's testimony that the accumul existed for more than two shifts, and since the roadway in questio was one traveled by miners and supervisory personnel I believe tha management should have known of the accumulations earlier than is by its post-hearing arguments and that its failure to exercise rea care to correct the conditions which caused the violation and whic respondent knew or should have known amounts to ordinary negligenc

Gravity

Although it is true that coal was not being mined at the time conditions were observed by the inspector and the one power cable may have been lying on the accumulations was not energized, the fa coal accumulations which are not cleaned up present a serious pote for a mine fire. In this case, while the probability of an ingini was low because mining was not taking place and the continuous min was down and deenergized due to some repair work, the fact is that were on the section and the existence of accumulations of combusti coal and coal fines presents a hazard to those miners. Under the stances, I conclude that the violation which I have affirmed is se

History of Prior Violations

The parties stipulated that in the 24 month period prior to t issuance of the citation in question, respondent had a history of assessed violations. In its post-hearing brief, petitioner allude a computer print-out showing a breakdown of assessed violations of section 75.400 by the respondent, and it was submitted on January The print-out shows 86 paid assessments by the respondent for viol of section 75.400, during the period December 29, 1978 to Decembe

For a mine of its size, I conclude that respondent's past his of assessed violations is not a particularly good one. Although p has submitted no details concerning the 86 prior citations concer

its clean-up program may be in need of further attention. I conclude that respondent's history of prior violations is such as to warrant an increase in the original penalty assessment made in this case and this is reflected in the penalty which I have assessed for the violation in question.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of $1200 is reasonable and appropriate for Citation No. 0655868, December 29, 1980, 29 CFR 75.400, and respondent IS ORDERED to pay the penalty within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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TOWERS NO. 2, 10TH FLOOR
5205 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 4 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings : Docket No. CENT 81-200-M A.O. No. 41-02664-05003
v.	:	
METRO ASPHALT COMPANY, Respondent	:	Docket No. CENT 81-201-M A.O. No. 41-02664-05004 : Leyendecker Paving Pit & Plant

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Mr. Burney T. Sullinger, Corpus Christi, Texas, for the Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), 1/ to assess civil penalties against Metro Asphalt Company. The hearing was held in Laredo, Texas on September 29, 1981.

The parties stipulated in regard to the history of previous violations by Metro Asphalt that the number of violations found in the two years previous to the inspection were few and that the size of Metro Asphalt can be considered small. In the absence of evidence to the contrary it is found that the penalties assessed will not affect the ability of Metro Asphalt to continue in business.

1/ Section 110(i) of the Act provides:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violation the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after

Citation No. 171466 (Exhibit P-1)

The inspector noted in the citation that:

> "The parking brakes on the 950 front end loader at the pit were inoperable. The front end loader operator is continuously loading haul trucks and employees were observed out of the haul trucks. The front end loader could roll forward or backward when the operator was not on the loader, and the loader could roll over an employee and seriously injure him.

30 CFR 56.9-3 provides that:

> "Powered mobile equipment shall be provided with adequate brakes."

The inspector checked the parking brakes by having the operator put the brakes on and then try to go forward. The loader kept on going forward indicating that the parking brakes were not operable. The terrain was on a slight incline. Putting the machine in gear will not stop the machine from rolling while parked because if hydraulic pressure is lost it can roll without the brakes being on.

The normal operating foot brakes were functioning properly but the parking brakes did not operate. 30 CFR 56.9-32 requires that dippers buckets, scraper blades and similar moving parts shall be secured or lowered to the ground when not in use. They may be either lowered to the ground or secured to prevent injuries in the event these moving parts should fail. Although it is safer and the equipment is not so likely to roll when the bucket is down the lowering of the moving parts to the ground is not an alternative to the parking brakes.

The equipment operator testified that he put the bucket down and pulled the hand (parking) brake when the equipment was parked. He does not get off the front end loader while the machine is still running. He parks it on level ground and puts it in first gear. At the time of the inspection the machine was on an incline and had to go on an incline to get to the stock pile.

Five persons (independent contractors) were congregated in the shade of the stock pile behind the machine where it would have to go backwards to unload. It is probable that the machine could roll over a person resulting in a fatality.

The operator (Metro Asphalt) should have been aware of the condition if the foreman, a competent designated person, or Mr. Leyendecker (President of Leyendecker Materials Inc., who was there most of the time)

was necessary to check the brakes to discover the condition was defective parking brakes. The negligence of the operator was therefo slight.

Metro Asphalt demonstrated good faith in achieving rapid compli after notification of the violation. The loader was removed from ser immediately to get it repaired. The citation was terminated by anoth inspector.

Citation 171467 (Exhibits P-2)

The inspector noted in the Citation that:

> "The head pulley on the No. Seven conveyor was not guarded. The pulley was approximately about four feet above ground level where persons servicing or doing maintenance could get entangled and receive serious injuries. There was one person in the area who does maintenance and service and clean-up."

30 CFR 56.14-1 provides that:

> "Gears: sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; saw-blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

The head pulley did not have a guard and a person could get entangl by falling or tripping. A shovel could get caught between the belt and the pulley and drag the workman in. The pulley was positioned about four feet above the ground. Inspector Herrera believed that it was a self cleaning pulley with ten or twelve wings extending from the hub creating multiple pinch points. Mr. Richard Leyendecker testified that it was not a self cleaning pulley. Since self cleaning pulleys were installed only at the tail end of conveyors the testimony of Mr. Leyendecker is accepted as more credible; however the head pulley still s have been guarded since it posed a hazard. The head pulley was a drum-type roller with the ends closed which resulted in fewer pinch points.

There were one or two persons in a "shack" about 40 feet from the head pulley. They clean up and do service maintenance in the area but were not observed actually working at the time of the inspection. The hazard existed only when the equipment was in operation.

The loader operator and the control operator are usually in the area. The plant equipment is electrically controlled by the operator who not physically next to the equipment Company

The record establishes that the operator was negligent since he should have known that the head pulley had no guard. The condition was obvious and in plain sight. The inspector had discussed head and tail guards since 1977 with Mr. Leyendecker, who was often in the area.

Metro Asphalt demonstrated good faith in achieving rapid compliance after notification of the violation. Mr. Leyendecker had the welder start working on the guards immediately. The citation was terminated by another inspector.

Citation 171468 (Exhibit P-3)

The inspector noted on the citation that:

> "The guard on the feed conveyor to the No. 3 shaker was not extended sufficient to prevent reaching behind guard and becoming entangled and receiving serious injuries. There was one employee in the area who did maintenance and service and cleanup."

The inspector was unable to remember this particular condition and no other evidence sufficient to prove a violation was adduced. The citation is accordingly vacated. 2/

Citation 171469 (Exhibit P-4)

The inspector noted on the citation that:

> "The V-belt drive on the Telesmith shaker was not provided with a guard. There was an elevated travel way next to the drive where persons could fall against and become entangled and receive serious injuries. There was one person who did service and maintenance on equipment."

2/ Where asked to explain the circumstances the inspector testified: "I can read here, but I cannot recall this particular incident. A feed conveyor, I mentioned the whole feeder conveyor; now, I did not mention the head or the tail pulley and this kind of throws me off." When asked what the guard on the pulley looked like he testified: "This is where my memory fails me, becuase this is talking about guarding a whole feeder and not a tail pulley or a head pulley. So I've been trying to picture in my mind what it was, but I can't. I can't recall." He also stated in a forthright manner that he did not put information on the citation that could refresh his memory.

The one person who did service and maintenance on the equipment was not on the walkway at the time of the inspection. The hazard existed only when the equipment was in operation. The walkway is approximately 10 feet off the ground with a loader going to it.

There had been a recent fatality in a limestone mine where a person was caught in the tail pulley while another person was attempting to remove a rock.

The pit is about three miles from the asphalt plant. The inspector inspects only the pit and crushing portion of the operation.

It is unnecessary to stop the equipment to oil or grease it or to clean-up. Stopping the equipment is not a requirement if it is guard Although no one is supposed to go on the walkway for servicing the machinery while it is in operation, the experience of the inspector is that an employee will sometimes clean up with the equipment in operation

The probability is slight that an employee will be injured in the area where the machinery is exposed.

The operator, Metro Asphalt, was negligent in that it should have known of the exposed V-drive belt. The condition was obvious and could be seen from the ground level.

Metro Asphalt demonstrated good faith in achieving rapid compliance after notification of the violations by putting a bar across the ladder going up to the elevated traveling and a sign reading "Do Not Enter." The operator also testified that the operator had welders start work on the guards immediately.

Docket CENT 81-200-M

Citation No. 171470 (Exhibit P-5)

The inspector noted in the Citation that:

> "The guard on the tail pulley of the crusher feed conveyor was not extended sufficient to prevent person from reaching behind guard and becoming entangled and receiving serious injuries. There was one person who did service and maintenance and cleanup."

tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley."

The record establishes a violation of 30 CFR 56.14-3. The guard on the tail pulley was not extended sufficiently. The back portion of the tail pulley was partially guarded up to a certain place but it was not guarded adequately. If a person were to trip he could put his hand where it would be caught between the tail pulley and the inadequate guard. MSHA recommends an expanded metal guard completely surrounding the tail pulley. The pulley is visible through the expanded metal yet it protects persons from being injured by the pulley.

Although it was normal company policy to shut down while doing clean-up, servicing or maintenance there is a slight probability under the circumstances existing that a person would be injured as a result of the unguarded tail pulley if the equipment should be started up accidentally or if a person did not abide by the company policy.

MSHA had previously required a guard to be installed in 1977 when 30 CFR 56.14-3 was not a mandatory requirement. Although the guard should be further extended, as now required by MSHA under the mandatory standard to reduce the hazard, the negligence of the operator under the circumstances was slight.

Metro Asphalt demonstrated good faith in achieving rapid compliance after modification of the violation by installing a guard on the tail pulley of the crusher feed conveyor. Welders started work on the guard immediately.

ORDER

An assessment of $40 is ordered for each of the four citations found proved. Respondent is ordered to pay petitioner the amount of $160 within 30 days of this date of this order.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 81-146
	:	A/O No. 36-00970-03094
v.	:	
	:	Maple Creek No. 1 Mine
UNITED STATES STEEL CORPORATION, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Depart of Labor, Philadelphia, Pennsylvania, for the Petitioner; Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Stewart

I. Procedural Background

On June 8, 1981, the Secretary of Labor (Petitioner) filed a petitic for assessment of civil penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S. § 801 et seq. (Supp. III 1979) (Act), charging United States Steel Corporation (Respondent) with five violations of law as set forth in vari citations issued pursuant to section 104(a) of the Act. The violations charged are identified as follows:

Citation No.	Date	30 C.F.R. Standard
1046741	2/11/81	75.1403
1046742	2/11/81	75.1403
1046753	2/17/81	75.1403
1046754	2/17/81	75.1403
1046755	2/17/81	75.1403

Each citation contained the additional allegation that the violation cha was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

any violations of 30 C.F.R. § 75.1403 occurred; (3) denying the allegation set forth in each of the 5 citations that the alleged violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (4) admitting that it is engaged in interstate commerce.

The hearing was held on August 11, 1981, in Pittsburgh, Pennsylvania with representatives of both parties present and participating. The Petitioner called Federal mine inspector Okey H. Wolfe as a witness. The Respondent called assistant mine foreman Joseph G. Ritz as a witness.

The parties waived the right to file posthearing briefs and proposed findings of fact and conclusions of law. However, the parties did present closing arguments. Such closing arguments, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

II. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of 30 C.F.R. § 75.1403 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

The following additional issue is presented in this proceeding: If the cited violations of 30 C.F.R. § 75.1403 occurred, then whether such violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. See Energy Fuels Corporation, 1 FMSHRC 299, 1979 CCH OSHD par, 23,503 (1979).

II. Opinion and Findings of Fact

A. Stipulations

1. The Maple Creek No. 1 Mine is owned and operated by the Respondent, United States Steel Corporation (Tr. 3-4, 6).

2. The Maple Creek No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 4, 6).

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein (Tr. 4, 6).

5. The assessment of the civil penalty in this proceeding will not affect the Respondent's ability to continue in business (Tr. 4, 6).

6. The appropriateness of the penalty, if any, to the size of the operator's business should be based on the fact that the Respondent's annual production tonnage is 14,585,534 tons; and the Maple Creek No. 1 Mine's annual production tonnage is 740,382 tons (Tr. 4, 6).

7. The Respondent demonstrated ordinary good faith and attained compliance after the issuance of each citation (Tr. 5-6).

8. The Maple Creek No. 1 Mine was assessed a total of 699 violations over 759 inspection days during the 24 months immediately preceding the issuance of the instant citations. Of these violations, 100 were cited pursuant to 30 C.F.R. § 75.1403 (Tr. 5-6).

9. The parties stipulate to the authenticity of their exhibits, but not to their relevance nor to the truth of the matters asserted therein (Tr. 5-6).

B. Occurrence of Violations

Federal mine inspector Okey H. Wolfe issued Citation Nos. 1046741 and 1046742 during the course of his February 11, 1981, regular inspection of the Respondent's Maple Creek No. 1 Mine. Citation No. 1046741 was issued at approximately 8:05 a.m., and charges the Respondent with a violation of 30 C.F.R § 75.1403 in that "[t]he sanding devices provided for the number 12 personnel carrier (portal bus) located on Spinner Bottom were not provided with sand." (Exh. G-1, Tr. 9). Citation No. 1046742 was issued at approximately 8:06 a.m., and charges a violation of 30 C.F.R. § 75.1403 in that "[t]he sanding devices provided for the number 13 personnel carrie (portal bus) located on Spinner Bottom were not provided with sand." (Exh. G-2, Tr. 9).

Inspector Wolfe issued Citation Nos. 1046753, 1046754 and 1046755 at the Maple Creek No. 1 Mine at approximately 8 a.m. on February 17, 1981. Citation No. 1046753 charges the Respondent with a violation of 30 C.F.R. § 75.1403 in that "[t]he sanding devices provided for the number 10 person carrier (portal bus) located on Spinner Bottom were not being well maintai due to a lack of sand being provided for the two outby sanding devices." (Exh. G-3, Tr. 11). Citation No. 1046754 charges the Respondent with a

not being well maintained due to a lack of sand being provided for the inby and outby sanding devices on the wide side" (Exh. G-4, Tr. 11-12). Citati No. 1046755 charges the Respondent with a violation of 30 C.F.R. § 75.1403 in that "[t]he sanding devices provided for the number 13 personnel carrie (portal bus) located on Spinner Bottom were not being well maintained due a lack of sand being provided for the inby and outby sanding devices on th wide side" (Exh. G-5, Tr. 12).

30 C.F.R. § 75.1403 provides as follows: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minim hazards with respect to transportation of men and materials shall be provided."

The five citations charge the Respondent with violations of 30 C.F.R. § 75.1403 based upon the Respondent's alleged failure to comply with the requirements of Safeguard Notice 1 HB, which was issued at the Respondent' Maple Creek No. 1 Mine on June 10, 1976. (Exh. G-6). 1/ The Safeguard Notice imposes a requirement on the mine operator whereby "[a]ll personnel carriers which transport more than 5 persons shall be equipped with a properly installed and well maintained sanding device in the mine."

1/ 30 C.F.R. § 75.1403-1 sets forth the following general criteria for th issuance of safeguard notices:

"(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided with the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the § 75.1403 series in this Subpart precludes the issuance of a withdrawal order because of imminent danger."

Safeguard Notice No. 1 HB, June 10, 1976, was issued pursuant to the safeguard notice issuance guideline set forth at 30 C.F.R. § 75.1403-6(b)((Exh. G-6, Tr. 15), which provides as follows:

"(b) In addition, each track-mounted self-propelled personnel carrie should:

* * * * * * *

(3) Be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport not mor than 5 men, need not be equipped with such sanding device;"

portal buses in question are electrically powered, track-mount personnel carriers used to transport the miners to the section (Tr. 58) Each has the capacity to carry more than 5 people (Tr. 15, 42), and eac equipped with four sanding devices with reservoirs capable of holding approximately 20 to 25 pounds of sand (Tr. 37-38, 59). There are two s devices for the inby direction and two for the outby direction (Tr. 37- meaning that there is one sanding device for each of the four wheels (Tr. 58-59).

The Maple Creek No. 1 Mine has approximately 20 to 25 miles of haul which is set up as a dual haulage system with one track reserved for inl traffic and one reserved for outbound traffic (Tr. 60). Sand stations a located at the portal bus station, along the haulage and in the sections along the flats (Tr. 59).

The Respondent's program for replenishing the sand in the sanding devices requires the portal bus operator to check the sanders when he arrives at the portal bus station at the beginning of the shift. Normal this occurs before the personnel carriers are energized with electrical power (Tr. 61, 63). The buses are then used to transport the miners to their work place, and the personnel carriers remain parked underground u the end of the shift. At the end of the shift, but prior to restoring electrical power to the personnel carriers, the portal bus operator is again supposed to check the sanding devices for sand (Tr. 63-64). If he runs out of sand during a run, he is required to replenish his sand suppl at the next sanding station which he encounters (Tr. 65).

Additionally, mechanics check the sanding devices between shifts to assure that they remain mechanically operational (Tr. 61-62).

All of the citations were issued in the portal bus boarding area at beginning of a shift at a point in time when the miners on the on-coming shift were preparing for transport to their work places. Although the citations were issued prior to the buses being put in motion (Tr. 27), all of the portal buses were ready and available for use (Tr. 15). There were no indications that the personnel carriers had been taken out of service for any reason (Tr. 15). Normally, the first 2 to 4 buses in line are use to transport the crews onto the section (Tr. 31). Additionally, the inspector testified that he did not give the portal bus operator or the on-coming shift an opportunity to determine whether there was sand in the sanders (Tr. 32-33).

With respect to the two citations issued on February 11, 1981, the evidence shows that approximately 7 or 8 men were sitting in the portal bus encompassed by Citation No. 1046741 (Tr. 10). The portal bus encompassed by Citation No. 1046742 was next in line, but there was no one aboard it.

There was no one aboard the three

17-18, 41-42). However, it appears that all of the sanding devices were mechanically operational (Tr. 27).

The Petitioner argues, in substance, that a violation of the Safeguard Notice exists whenever a personnel carrier which transports more than five persons is in the mine, out of sand, and not tagged out of service because, while in such condition, the sanding devices are not being "well maintained. According to the Petitioner, the personnel carriers are available for use, even though not in motion, and are not being properly maintained (Tr. 79).

The Respondent concedes that a violation would have existed if the cite personnel carriers had departed the station with empty sanding devices. However, the Respondent maintains that there will be occasions in the normal course of operation when the sanders will be empty, and argues that so long as it has and enforces a program to fill the sanders, and so long as sand is available for the sanders, no violation exists. The Respondent also argu that the Safeguard Notice requires only the presence of sanding devices capable of being used (Tr. 81-82).

The subject Safeguard Notice requires all personnel carriers which transport more than five persons to be equipped with a properly installed and well maintained sanding device. A sanding device which does not contain sand at a time when such personnel carrier is in use cannot be considered "well maintained" within the meaning of the Safeguard Notice. Whenever a personnel carrier is available for use, as these were, it must be considered to be in use. See Eastern Associated Coal Corporation, 1 FMSHRC 1473, 1979 CCH OSHD par. 23,980 (1979). Additionally, the fact that the sanding device must be well maintained at all times while in use indicates that the reservoirs should have been checked and refilled promptly when the personnel carriers returned to the station after the prior run.

Furthermore, the requirements imposed on the Respondent by the Safeguar Notice are clearly applicable to all personnel carriers with the capacity to transport more than 5 persons. The fact that it may have been holding five, or fewer, persons when a given citation was issued is not a defense if it is capable of holding more than five persons.

It should also be noted that the Respondent never proved that the sandi devices would, in fact, have been checked and refilled before the personnel carriers departed the station. The portal bus operators, the individuals assigned by the Respondent to perform this task, were never called by the Respondent to testify on this point. It is significant to note that 7 or 8 men were aboard the portal bus cited in Citation No. 1046741 when such citation was issued. This indicates that it was at least possible that portal buses would have been operated with empty sanding devices.

presenting an electrocution hazard (Tr. 65-66, 75-77).

The use of sand to provide added traction for track-mounted haulag vehicles is a long standing practice in the mining industry. It is cor ered singularly inappropriate to entertain the Respondent's challenge t this long standing practice on the basis of the testimony of one witnes appears to have no specialized expertise in electrical matters. This i was not raised by the Respondent in its answer, and there is no indicat that the Petitioner was given any other form of notice that the Respond wished to raise it in this proceeding. Considering the significance of challenge to the safety of miners, the issue should have been specifica raised prior to the hearing so as to give the Petitioner adequate oppor to prepare and present expert testimony in rebuttal.

In view of the foregoing, I conclude that Citation Nos. 1046741, 1046742, 1046753, 1046754 and 1046755 properly charge the Respondent wi violations of Safeguard Notice 1 HB, June 10, 1976, and, hence, of 30 C § 75.1403. I find that the violations charged have been established by preponderance of the evidence.

C. Negligence of the Operator

The record contains no probative evidence to establish either that Respondent's supervisory personnel or that those persons designated by Respondent to perform inspections or examinations required by law had a or constructive knowledge of the violative conditions. Accordingly, I conclude that the Petitioner has failed to prove the mine operator's negligence by a preponderance of the evidence.

D. Gravity of the Violation

Properly installed and well maintained sanding devices provide add tional traction for track-mounted personnel carriers when the need aris They deposit sand on the rails, as the need arises, to provide addition friction between the wheels and the rails, providing traction when slic conditions are encountered and for sudden stops and starts (Tr. 18-19, 22-23, 37-39). Mr. Ritz testified that there are areas along the haula which are "reasonably level" and areas that have "some degree" of slope (Tr. 60).

The inspector testified that a haulage accident could result from lack of sand, and that an occurrence of the event against which the cit standard is directed would be expected to result in broken bones, cuts, bruises, abrasions and/or concussions. Up to 10 people would have been affected by an occurrence (Tr. 44-45).

been placed in motion with empty sanders. In this regard, the record cont only the inspector's speculation that "[i]t could well happen" (Tr. 44). To hold otherwise on the facts of this case would, in effect, require that official notice be taken that all violations of the type charged present a probability of occurrence classified as "probable," without regard to th particular conditions existing along the haulage.

In view of the foregoing, it is found that the violations were of moderate gravity.

E. Remaining Penalty Assessment Criteria

Based upon the stipulations entered into by the parties, I find: (1) that the Respondent demonstrated ordinary good faith and attained compliance after the issuance of each citation; (2) that the Respondent is a large operator; (3) that the Respondent's history of previous violations is moderate; and (4) that the assessment of the civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

F. Significant and Substantial Criterion

The inspector included findings on the face of each citation that the violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. His testimony indicates that the determination was based upon an application o the test set forth by the Interior Board of Mine Operations Appeals in Alabama By-Products Corporation, 7 IBMA 85, 94, 83 I.D. 574, 1 BNA MSHC 14 1976-1977 CCH OSHD par. 21,298 (1976) (Tr. 50-51). This test was overrule by the Commission in National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 12 1981 CCH OSHD par. 25,294 (1981), wherein it was held:

> [T]hat a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. Additionally, the Commission stated that:

> Although the [Federal Mine Safety and Health Act of 1977] does not define the key terms "hazard" or "significantly and substantially," in this context we understand the word"hazard" to denote a measure of danger to safety or health, and that a violation "significantly

cause and effect must be significant and substantial."
3 FMSHRC at 827. [Footnote omitted.]

The inspector testified that he did not know, and that it "would be tough to say," whether he would have included such findings on the face of the citations under the "new policy." (Tr. 51).

In view of the inspector's testimony on this point, and in view of th findings set forth in Part V-D of this decision, I conclude that the Petitioner has failed to prove that the violations were of such nature as could significantly and substantially contribute to the cause and effect o a mine safety or health hazard under the test set forth in National Gypsum

VI. Penalty Assessed

Upon consideration of the entire record in this case and the foregoin findings of fact and conclusions of law, I find that the assessment of civ penalties is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
1046741	2/11/81	75.1403	$50
1046742	2/11/81	75.1403	50
1046753	2/17/81	75.1403	50
1046754	2/17/81	75.1403	50
1046755	2/17/81	75.1403	50

ORDER

Accordingly, IT IS ORDERED that Citation Nos. 1046741, 1046742, 10467 1046754 and 1046755 be, and hereby are, MODIFIED to delete the issuing inspector's findings that the cited violations were of such nature as coul significantly and substantially contribute to the cause and effect of a mi safety or health hazard.

IT IS FURTHER ORDERED that the Respondent pay civil penalties totalin $250 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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Louise Q. Symons, Esq., United States Steel Corporation, 600 Grant Street, Pittsburgh, PA 15230 (Certified Mail)

FEB 4 1982

C F & I STEEL CORPORATION, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION PROCEEDING DOCKET NO. WEST 80-384-R Order No. 827062; 6/12/80 MINE: Allen

DECISION AND ORDER

Appearances:

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For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Pursuant to Section 105 of the Federal Mine Safety and Health Act o 1977, (hereinafter the "Act") Contestant applied for review of Withdrawa Order No. 827062, dated June 12, 1980, alleging that no unwarrantable failure to comply with a mandatory health and safety standard occurred. The underlined mandatory standard was 30 C.F.R. 75.301. That regulation provides in pertinent part: "All active workings shall be ventilated by current of air ... The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries ... shall be 9,000 cub feet a minute ... .

1. While conducting an inspection of contestant's Allen Coal Mine on June 12, 1980, an MSHA inspector took air flow samples in the last open crosscut in one section of the mine. There were six entries into the section of the mine which was inspected.

2. The MSHA inspector measured air flow in the last open crosscut between the No. 5 and No. 6 entries as 6,552 cubic feet a minute (hereinafter "cfm"). Between entry No. 1 and No. 2 in the last open crosscut no perceptible air movement could be detected.

3. Immediately outby the last open crosscut there was a brattice curtain across the No. 1 entry. The only opening in the curtain through which air could pass was a ventilating tube 18 inches in diameter which ran along the left rib of the No. 1 entry, then through the brattice curtain with the opening of the ventilating tube ending near the working face at the end of No. 1 entry.

4. At the time of the inspection, 12:20 a.m., there was no mining of coal taking place in the section.

5. At the end of the production swing shift just prior to the time of the inspection, air flow in the section was 25,200 cfm and no methane gas was present.

6. During the idle shift maintenance is performed at the mine, and at the time of the inspection the mainenance shift personnel were on their way to the mine. The MSHA inspector prevented the maintenance shift from going into the section inspected by posting a closure sign and issuing Withdrawal Order No. 827062.

7. On two previous maintenance shifts within two days prior to the inspection in this section of the mine, the pre-shift examiner had recorded that methane gas in excess of 5% was present in that section of the mine.

Issues

1. Did the contestant violate 30 C.F.R. 75.301 relating to the amount of air required at the last open crosscut on June 12, 1980?

2. If contestant did violate 30 C.F.R. 75.301, was the violation the result of an unwarrantable failure on the part of the contestant to comply with such regulation?

Discussion

The cited regulation requires that in all active workings the minimum quantity of air reaching the last open crosscut shall be 9,000 cfm.

roof bolting is done, and deadended entries will be ventilated by a perceptible movement of air. There is no requirement in the plan for 9,000 cfm in the last open crosscut with respect to idle sections.

Contestant argues that 9,000 cfm of air is required in the last open crosscut in order to ensure that a minimum of 3,000 cfm reaches the working face. Since no coal was being cut, mined or loaded, the workings were not "active" but were idle, and idle working faces need only a perceptible movement of air to be in compliance with the approved ventilation plan.

"Active workings" are defined as "all places in a mine that are ventilated and inspected regularly." U.S. Department of the Interior, Bureau of Mines, a dictionary of Mining, Mineral and Related Terms. Page 11 (1968). No mention is made in the definition that there must be production of the mineral in order for there to be "active workings".

During the idle shift at the Allen Mine, the maintenance personnel come on duty. These miners are not producing coal, but are engaged in maintenance activity. Contestant is attempting to draw too narrow of a distinction in defining "active workings". The working activity taking place in the section inspected consisted of production shifts, and maintenance or idle shifts. Since this section was ventilated and inspected regularly, it must be classified as "active workings". The last open crosscut did not have the flow of air required by the cited regulation. Therefore, my conclusion is that there was a violation of 30 C.F.R. 75.301 by the Contestant.

The next question is whether or not the violation was a result of an unwarrantable failure of contestant to comply with the regulation. Specifically, did the contestant intentionally or knowingly fail to comply with the regulation or demonstrate a reckless disregard for the health or safety of the miners? Itmann Coal Company v. The Secretary of Labor, Mine Safety, and Health Administration (MSHA), 2 MSHC 1277 (1981).

The MSHA inspector testified that Contestant failed to provide adequate ventilation to the working section even though there was a known possibility of the accumulation of excessive methane gas to an explosive level. The two previous pre-shift reports for the maintenance or idle shift showed the presence of methane gas of approximately 5%. These reports were for the two days preceding the date the withdrawal order was issued. However at the end of the production swing shift just prior to the maintenance or idle shift during which the inspection took place, ther was no methane present.

The MSHA inspector testified that at the time of the violation the ai that should have been going to the last open crosscut from No. 2 to No. 1

brattice curtain. In checking further the inspector found that there was no movement of air on either side of the curtain. He gave his opinion th because there was no movement of air into the area, the 18 inch ventilati tube was ineffective as an exhaust. He further stated that it was not sound mining practice to cut off ventilation in areas of known methane accumulation.

The contestant's section foreman informed the MSHA inspector that th brattice curtain was installed in order to keep the working face of the 1 1 entry, immediately inby where the brattice was erected, clear of methan gas by use of the 18 inch ventilating tube. The section foreman felt tha this procedure was sufficient to accomplish the job. The 18 inch ventilating tube was intended to be used to carry return air. With this explanation by contestant's section foreman, it is apparent that contesta was attempting to keep the working face at the end of No. 1 entry free of methane during the idle or maintenance shift. When the MSHA inspector wa asked whether there was any accumulation of methane gas in the section between the time the withdrawal order was issued and seven and a half hou later when the withdrawal order was terminated, he stated "not to my know ledge."

Contestant points out that the approved ventilation plan requires th idle working faces will be ventilated by a preceptible movement of air, a that tubing in conjunction with line brattice is used to provide ventilation of the working face and no auxillary fans are operated during idle shifts. Contestant was performing in accordance with this section o the ventilation plan. However, the plan also calls for a minimum quantit of 9,000 cfm of air flow reaching the last open crosscut, the same provision as the cited regulation.

The evidence does not show that contestant intentionally or knowingl failed to comply with the regulation in question. The section foreman's report prepared at the end of the shift immediately preceding the issuanc of the withdrawal order showed that there was no methane gas present, and the air flow was 25,200 cfm. During the idle shift contestant was at- tempting to ventilate the section in which the brattice line and ventilating tube had been installed. The evidence shows that there was accumulation of methane between the time the order was written and seven and a half hours later when it was vacated. Since these actions took pl I cannot find that contestant exhibited a reckless disregard for the hea or safety of the miners.

I find contestant's evidence credible in that contestant believed th because there was an idle shift period in the idle section, the contesta was in compliance with its approved ventilation control plan by merely providing a preceptible movement of air at the working face. I also fin that this was the reason that contestant believed that 9,000 cfm of air

ORDER

Insofar as Withdrawal Order No. 827062 finds that the violation of C.F.R. 75.301 resulted from an unwarrantable failure of contestant to comply with that regulation, the Order, is VACATED. The allegation of violation 30 C.F.R. 75.301 along with the Withdrawal Order is AFFIRMED.

Jon D. Boltz
Administrative Law Judge

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FEB 4 1982

DONALD L. LUND, Complainant,	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE
v.	DOCKET NO. WEST 81-193-DM
ANAMAX MINING COMPANY, Respondent.	

Appearances:

Donald L. Lund, appearing Pro Se
Tucson, Arizona

Steven Weatherspoon, Esq., Chandler, Tullar, Udall & Redhair, Tucson, Arizona, appearing for Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

Complainant Donald Lund brings this action on his own behalf alleging he was discriminated against by his employer, Anamax Mining Company, (Anamax), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

§ 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an

and potential transfer under a standard published pursuant t section 101 or because such miner, representative of miners applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or cause of the exercise by such miner, representative of miner applicant for employment on behalf of himself or others of a statutory right afforded by this Act.

After notice to the parties, a hearing on the merits was hel Tucson, Arizona on August 25-27, 1981. The parties filed post tr briefs.

PRE-TRIAL MATTERS

A pre-trial hearing was held in this case in Tucson, Arizona 14, 1981. At the hearing, the Commission's procedures were expla the parties as well as the applicable case law as set forth in Da v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on ot grounds, No. 80-2600 (3d Cir. October 30, 1981).

At the prehearing conference complainant Donald Lund (Lund) his case involved some 20 instances of discrimination (Tr. 15, 24 Pre-Hearing), The Judge and the parties discussed discovery, the an amended complaint, and a trial date of September 29, 1981. Va other matters relating to the hearing were discussed. Lund asser the acts of discrimination by Anamax were continuing. However, s was necessary to bring the case to issue an oral order was entere effect that only claims of discrimination that had occurred befor previous day (July 13, 1981) would be considered (Tr. 29, Pre-Hea July 31, 1981, Lund filed his amended complaint alleging thirty-s instances of discrimination.

On July 20, 1981, Lund filed a letter with the Commission st a fellow worker, whom he identified by name, stated to Lund on An property, among other things, "If you close this mine down I'm go my .357 and shoot you."

A copy of Lund's letter with a general explanation of the na the case was forwarded to A. Bates Butler, then the United States in Tucson, Arizona. Copies of this correspondence were forwarded the MSHA office in Tucson, counsel for respondent, and the Commis Chief Judge, James A. Broderick.

The allegations in Lund's letter occurred after July 13, 198 issues arising out of that incident are not considered in this de

violated the Act.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of § 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity a (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activitie and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone, David Pasula, supra. Furthe in order to support a valid refusal to work the miner's perception of th hazard must be reasonable. Robinette v. United Castle Coal Company 3 FMSHRC 803, (1981). In Johnny Chacon v. Phelps Dodge Corporation WEST 79-349-DM (November 13, 1981) the Commission analyzed some of the circumstantial indicia of discriminatory intent.

SYNOPSIS OF THE CASE

Lund asserts that he gave a statement concerning an unsafe conditio on a power shovel to the Anamax safety department and was, thereafter, t subject of retaliatory conduct by Anamax for engaging in that protected activity. The alleged retaliation suffered by Lund consists of the following claims: he was ordered to work under unsafe conditions; he was threatened; he was verbally abused; he was issued letters of discipline; was unjustifiably charged with absences from his job; and other miscellaneous actions by Anamax. Lund complains about thirty-six instances of alleged retaliation. Additionally, it appears from the transcript of th hearing that Lund claims that when Anamax failed to provide him a safe w place, and he argues that, in and of itself, this constituted discrimination.

Lund's last claim has no support under the Act. The failure to provide a miner with a safe workplace may constitute a violation of a mandatory health or safety standard and thereby be a violation under the Act, but such a failure does not without more constitute discrimination. An act of discrimination under the Act occurs only when a mine operator takes adverse action against a miner because the miner has engaged in an activity that is protected by the Act. Pasula, supra.

Lund's contention that all thirty-six instances of alleged adverse action occurred because Anamax was retaliating against him for the statement he gave concerning the power shovel incident is not supported the record. Lund's statement and the various other safety complaints voiced by him were protected activity. However, Lund either failed to

the allegation followed by the findings of fact and a discussion. Occasionally controverted facts appear and they are identified as such the discussion portion of the incident.

Various management supervisors were involved with Donald Lund in various aspects of his case.

Lund, an Anamax welder, worked in the weld shop. His direct supervision in the weld shop included:

Dayton Miller
Jerry Hyder

additional supervisors included:

Tony Rael, assistant superintendent
Robert Nelson, superintendent

Lund's welding duties also took him to various other Anamax departments. While in those other departments he would be under the directions of other supervisors. These included the following:

Bill Bissell
Maderas, Bissel's supervisor
Marshall Foster, front line supervisor
Keppner, supervisor
Rudolfo Ypulong, front line supervisor in electrical part department
Hassell Logan, superintendent, conveyors
Shelley, shovel superintendent
Justin "Red" Taylor, supervisor

Bissell was terminated by Anamax a few months before the trial be "he was not an adequate supervisor" (Tr. 805). Maderas and Keppner resigned in protest of Bissell being discharged. Also involved in por of Lund's case are:

Paul Weathers, security guard
Charles Bishop, plant protection and Emergency Medical Technician

Persons in Anamax's safety department include:

Gerald Johnson, Director of Loss Prevention
John Caylor, Manager of safety and health under Johnson's supervision

2. On April 25, 1980, the S-10 shovel shorted out due to a ground fault on the 4160 volt circuit. Foreman Bill Bissell was told by electrician Richardson to keep personnel off the shovel, but Bissell nevertheless directed 5 men to work on the shovel (Exhibit P-3).

3. The seven members of the shovel crew filed an employee complaint with the Joint Health and Safety Committee. Robert Snyder, as the Teamste union stewart, filled out the complaint. All members of the crew signed the complaint (Tr. 57, 61-62, 387, P-3).

4. Lund was in the manbasket preparing to repair the shovel; if ther had been a short he could have been electrocuted when the power was turnec on[1]/ (Tr. 55).

5. Worker DeAnda and all of the members of the crew were interviewed by the Joint Safety Committee which consisted of Arno Gates (for management) and Walter Yturralde (for the union) (Tr. 57, 58, P-3).

6. The Joint Safety Committee is provided by contract between Anamax and the workers. Under the contract an employee is to report an unsafe condition to his supervisor. If they do not agree the worker has a right to relief from his job and he may return on the next shift without discipline. If the right is exercised there is an automatic investigation by the Joint Safety and Health Committee which consists of an equal number of representatives for management and the union. If the individual's actions are found to be justified he'll be paid for the time he was off the job (Tr. 503, 504).

In this instance the Committee report outlined the power shovel dispute, made recommendations, and concluded that there could have been a communication problem between Richardson (electrician) and Bissell (foreman). Further, the Committee concluded that the two men working on the tracks and the welder working on the boom out of the bucket could have been hurt when power was restored if there still had been a short in this machine. Fortunately, this did not happen because there was no power due to faulty circuits. Also the high voltage fuses had blown.

8. Worker DeAnda, a member of the crew, was not treated any differently after the shovel incident than before (Tr. 61).

9. Within one or two weeks after the incident, about April 1, 1980, Lund went to the Anamax safety office and gave a statement to Gerald Johnson, Anamax's Director of Loss Prevention. Lund volunteered to give the statement because the company had not disciplined anyone as a result of the shovel incident (Tr. 390-391, 774).

transcription of his statment at that time (Tr. 397).

12. Johnson testified that Lund requested that the tape be played Johnson for "the powers that be" and it was (Tr. 778).

13. According to Johnson he played Lund's tape for Pijanowski (Vic President, Personnel, Johnson's superior); for the shovel and drill cre management comprising of Kepner, Maderas, and Bissell; also he played i for Rosson, maintenance superintendent, as well as some for the Anamax Legal Department (Tr. 805-806).

Lund is correct when he states that his activities in reporting to Anamax safety department were protected under § 105(c) of the Act. How ever, at this point no retaliatory moves had been made by Anamax. If t is no discriminatory retaliation there is no violation of the Act. It accordingly necessary to review the subsequent events.

I

TIPPING FRAME INCIDENT[2]/

14. Lund was dispatched out of the weld shop to work on a drilling (Tr. 134-135, P-7).

15. A portion, or about half, of the area where the drilling rig w situated had been blasted (Tr. 135-136).

16. As Lund was welding underneath the outrigger the pad behind hi rose and because of the loose ground the drill started to tip over (Tr. 136-139).

17. At this point Maderas (Bissell's supervisor) drove up, and started hollering. The mechanics immediately told Lund to get out from under the drill (Tr. 138, 139).

18. Foreman Bissell was at the site before the drill started to t over (Tr. 399).

Lund's theory here is that he was discriminated against because he told to work in a situation which proved to be unsafe. The Act and its legislative history do not support Lund's theory of the case. Discrimination occurs when a mine operator retaliates against a miner because the miner engaged in a protected activity.

USE OF WELDING TRUCK WITHOUT BACKUP ALARM 3/

Witnesses: Lund, Miller, Ypulong, Johnson.

19. Two or three weeks after his statement was taped, Lund's duties quired him to use a truck (Tr. 140-145, P-8, P-9).

20. The truck did not have a backup alarm. When he discussed the oblem with his foreman (Ypulong) he was told to take the truck, be reful, and tag it out when he returned (Tr. 146, P-10).

21. Foreman Dayton Miller arrived at 6:30 for the 7:00 o'clock ift. He was hostile and mad and he told Lund he could receive a safety rning letter 4/ for taking the truck (Tr. 147, 148).

22. No one had ever been issued a safety warning letter for using a uck without a backup alarm (Tr. 148).

23. Lund did not receive a safety warning letter (Tr. 148, 410).

24. When Lund complained to Johnson about Miller's threat of issuing safety warning letter Johnson checked the truck's records. The records owed the truck was in "rebuild" until the shift before Lund used it (Tr.).

Paragraph 2 of amended complaint.

The Safety Warning Letter finds its basis in Anamax's 54 page rule book ich provides, in part, as follows:

FETY WARNING LETTERS

Safety Warning Letters will be issued to cover infractions of Anamax fety Rules, federal, state and local health and safety laws.

FIRST LETTER:	Warning (See next paragraph)
SECOND LETTER:	Mandatory minimum three days suspension.
THIRD LETTER:	Mandatory termination, if issued with 12 month period (Not calendar year.)

The seriousness of the infraction will determine the degree of rrective action taken, ranging from the above specified standards to rmination for either the first or second letter issued. (Exhibit P-18,).

26. The truck also lacked a whip light (similar to an off of the roa antennae).

27. Lund told Miller he considered that the threat of the issuance o a safety letter was retaliation for his taped testimony. Miller denied that (Tr. 148).

28. Miller treated Lund the same as any other worker, and he told hi if he checked out a similar truck in the future someone would give him a safety warning letter (Tr. 696).

It is not necessary for this decision to consider whether the events here constitute a violation of Title 30, Code of Federal Regulations, Section 55.9-87, or the same regulation at Section 56.9-87. The MSHA mandatory standard provides as follows:

> Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

No evidence supports Lund's conclusion that the threat of the issuanc of a safety warning letter was in retaliation for his taped statement to the safety department. Miller's statements to Lund occurred immediately upon his discovery of the use of the truck. Johnson, the director of los prevention, thought such a letter should have been issued. This evidence supports the view that Miller's anger was genuine and not related to Lund's protected activity.

Lund claimed the truck had been used by 12 shifts, or 12 people, before he used it but I accept Johnson's testimony because he checked the truck's records. These records indicated the truck was in "rebuild" unti the shift before Lund used it (Tr. 785, 786).

A safety warning letter generally is issued by a foreman and such a letter is not unusual. Approximately 50 such letters were issued in the last 12 months (Tr. 806-807). The issuance of a safety warning letter or the legitimate threat of the issuance of such a letter, as in this situation, is a proper management device.

III

FOREMAN RAEL REPRIMANDS LUND FOR NOT GOING THROUGH THE CHAIN OF COMMAND[5]/

Miller's supervisor. Rael asked Lund why he went around the chain of command and shot his mouth off to Johnson. Furthermore, why hadn't he notified Rael if he had a problem (Tr. 150-152).

30. Rael told Lund it was company procedure for a worker to go to his superintendent with a safety problem. He further explained that if the worker did not obtain relief, (as from foreman Miller), he could go to the next senior supervisor (to Rael), or to Rosson, and right on up (Tr. 524, 525).

31. Lund told Rael the three page handwritten statement concerning the shovel incident was on Rael's desk. Rael said he hadn't seen it. Lund said he was upset and Rael said to write it out or write a book (Tr. 151-152).

32. Lund and Rael also discussed the backup alarm. When he was asked to elaborate Rael said that weld trucks didn't need a backup alarm (Tr. 152).

33. Lund asked about various safety matters and Rael didn't have the answers (Tr. 152).

Lund, in rebuttal, asserts that Rael's testimony is only correct insofar as he spoke about workers going through the chain of command (Tr. 835).

Lund's rebuttal testimony is not further discussed at the hearing or in his post trial motion. I assume he is complaining about Rael's characterization that he did not reprimand Lund which conflicts with Lund's statement that he was reprimanded. In any event such testimony of each witness is conclusory in nature and it is necessary to look to the actual statments of each of the participants.

Reprimand, according to Webster 6/ means "a severe or formal reproof", or "to reprove sharply or censure formally usually from a position of authority." In the latter sense Rael did censure Lund. However, the uncontroverted evidence is that it is company policy for a worker with a safety complaint to first complain to his immediate supervisor. If the situation is not relieved then the worker goes to the second

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6/ Webster's New Collegiate Dictionary, 1979.

going to his immediate supervisor with a safety complaint is to gi supervisor an opportunity to correct the condition (Tr. 524). Whi explanation is that he went to Johnson's safety department because unable to accomplish anything at the lower level (Tr. 525), I conc had a legal right to reprimand Lund for not following the company procedure.

Rael had been told by the supervisors that Lund was argumenta going to the safety department to register complaints rather than them through the line supervisors (Tr. 524). The absence of Lund safety department presented scheduling problems for Rael (Tr. 527)

There are three avenues a safety complaint can go at Anamax. are the Joint Safety and Health Committee; a complaint lodged with supervisor and up the chain of command; and a complaint lodged dir with the safety department. In short, I conclude that Rael had a right to reprimand Lund. Cf Chacon v. Phelps Dodge Corporation, W 79-349-DM (November 13, 1981).

IV

ROSSON THREATENS LUND WITH SAFETY LETTER[7]/

Witnesses: Lund, Johnson

The events here are a sequel and they occurred on the same mo that Miller threatened to issue the safety warning letter for no b alarm in II, and the conversation with Rael in III (Tr. 155-158).

34. Lund went to Johnson's office to report the situation (T 155-158).

35. Lund related to Johnson his conversation with Miller and Johnson said he'd take care of it (Tr. 156).

36. Rosson (management) talked to Johnson over the telephone Lund was in Johnson's office (Tr. 413).

7/ Paragraph 4 of the amended complaint.

the truck as well as those who assembled it without the alarm (Tr. 414-415).

38. Rosson didn't talk to Lund personally (Tr. 158).

39. Johnson didn't recall talking to Rosson over the phone about whether Lund should get a safety letter (Tr. 786-787).

Lund claims Rosson threatened the issuance of a safety warning le while he (Rosson) talked to Johnson. Lund didn't hear the conversatio did he talk to Rosson. Johnson doesn't recall the conversation. I conclude there is no basis in fact for the allegation since there is n showing how such a threat was ever conveyed to Lund. The proof of thi allegation fails.

V

RUPTURED FUEL TANK ON WELDING MACHINE[8]/

Witness: Lund

40. Right after lunch, (on an unstated date), Lund found a split seam on his gas tank. The seam crack had a hole in it (Tr. 158-163, 4

41. Raw gasoline was running into the armature (Tr. 161).

42. When he found this situation Lund rolled up his gear and pul away (Tr. 161).

43. Within 5 to 15 minutes foreman Bissell appeared. He refused Lund's request for the water truck to wash down the gasoline (Tr. 162)

44. Bissell told Lund to return the truck and get another. Lund concerned about the 20 gallons of gasoline in the welder and 26 gallons gas in the tank of the truck (Tr. 162).

45. Lund didn't see anyone puncture the tank (Tr. 424).

46. Bissell said he'd assume responsibility for fire, which did occur (Tr. 162, 430).

Lund alleges that someone punctured the tank (Tr. 424). At the t of this incident, Lund thought he was "being hunted", but he didn't wr on his equipment defect report that someone had punctured the tank bec he wanted to "catch them" (Tr. 426, 428). There is no evidence to su Lund's view that some person or some person on behalf of Anamax was "hunting him."

activities do not constitute discrimination under the Act. Lund would have been justified in refusing to drive the truck under the conditions he described, but his evidence does not support a claim of discrimination.

VI

HYDER'S STATES "I DON'T GET MAD, I GET EVEN"[9]/

Witnesses: Lund, Hyder

47. Two to three weeks after he made the tape concerning the power shovel incident, a remark brought up the subject and Lund asked his direct weld shop foreman, Jerry Hyder, if he had any hard feelings (about the tape).

48. Hyder's reply was "I don't get mad, I just get even."

49. Hyder hasn't done anything to "get even" (Tr. 432).

50. Hyder explained that there was something said about a person getting mad hence the nature of his answer to Lund (Tr. 765).

51. Hyder's statement was made in a joking manner (Tr. 765, 766).

52. Hyder knew about the tape recording (Tr. 766).

According to Webster's New Collegiate Dictionary a threat is defined as 1: "an indication of something pending [the air held a-- of rain] 2: an expression of intention to inflict evil, injury, or damage 3: something that threatens."

Lund indicated that it didn't appear to him that Hyder was joking and "he sure didn't smile" (Tr. 165). I find Hyder's view that his statement was made in a joking manner is more credible. By it's very nature Hyder's reply requires a touch of solemnity. Further, in finding this a mere exchange between the parties I note that Hyder never did "get even." He certainly had the opportunity since he was Lund's direct weld foreman and responsible for the safety equipment on the truck (Tr. 163, 164).

VII

ATTEMPTED DISMISSAL OF LUND BY BISSELL [10]/

Witnesses: Lund, Hyder, Johnson

9/ Paragraph 6 of the amended complaint

54. Lund cut off a catwalk and had laid out material to construct a new one (Tr. 173, 434, P-13, P-14, P-15).

55. Bissell arrived and told Lund to modify the old catwalk and put it back (Tr. 174).

56. A heated argument ensued (Tr. 174).

57. Lund refused to build the catwalk the way Bissell wanted it (Tr. 174).

58. Lund told Bissell if he wanted to take him "to the gate" he'd have to get some security guards (Tr. 175).

59. Lund was upset and when Bissell returned without any guards Lund said he was sick (Tr. 175).

60. Lund went to the guard shack and called Gerald Johnson in the safety department (Tr. 177).

61. Johnson appeared, investigated the incident, and said there was misunderstanding over Lund's work attitude (Tr. 788).

62. Hyder initially marked Lund's time card to indicate he was being sent home for disciplinary action but later, because of Johnson, he change it to show that Lund went home "sick" (Tr. 768, 769).

63. Lund was not disciplined nor fired as a result of this incident (Tr. 178, 179).

64. A front line superintendent (such as Bissell) has no authority t dismiss an hourly employee (Tr. 787).

Lund's theory in this incident is that discrimination occurred when Bissell refused to listen to Lund's reasons why Bissell was wrong in his instructions. Bissell told Lund to do the job the way he (Bissell) wanted it done (Tr. 435).

An hourly employee does not have a right to direct a supervisor in an area within the supervisor's authority. However, Lund's testimony is considered a general complaint of a supervisor's directive that could result in an unsafe condition. As such the complaint is a protected activity. Lund's evidence shows a type of catwalk construction done incorrectly (Tr. 169, P-13) and one done correctly with a center splice (Tr. 169, P-14). However, while the record favorably supports Lund's ability as a craftsman, I am unable to perceive from the evidence whether

the argument was over who would be "boss", Lund or Bissell. To reach for the conclusion that Bissell was retaliating because of some protected activity by Lund is not justified under the evidence.

VIII

TEN DAY ATTENDANCE DISCIPLINE LETTER RECEIVED BY LUND. THE LETTER WAS ISSUED IN ERROR 11/

Witness: Lund

65. Lund received a discipline letter stating that he had been charged with ten absences in the past 12 months (Tr. 179).

66. Lund had missed only eight days. When Lund contacted foreman Dayton Miller the error was corrected and the letter withdrawn (Tr. 180-181).

67. Lund could not get an answer as to who was responsible for the letter (Tr. 181).

The Anamax procedure on employee absences is discussed infra.

The evidence here fails to establish any discrimination against Lund. When the error was established the letter was withdrawn. A mere error in an internal company procedure will not generally support a claim of discrimination.

IX

LUND RECEIVED SAFETY DISCIPLINE LETTER FOR LIFTING A LINER WITHOUT HELP. HE ASSERTS THE LETTER WAS ISSUED COMPLETELY WITHOUT GROUNDS. 12/

Witnesses: Lund, Foster, Hensen, Johnson

68. On July 26, 1980 Lund was welding liners on a shovel bucket (Tr 182-184, P-16).

69. Supervisor Foster and two mechanics assisted Lund in setting two or three liners in place. A man was on each corner moving the liners into place (Tr. 182, 563).

11/ Paragraph 8 of amended complaint.

71. When Foster left the work area the liner was three to three and half feet from where it was to be placed (Tr. 552).

72. Lund then took a 24 inch crowbar and moved the liner around until got to the spot where he could tack it down (Tr. 186).

73. Lund felt a twinge in his back (Tr. 186).

74. The liners weigh 208 pounds and measured 24 by 36 inches; it is and half inches thick (Tr. 185, 189, P-38).

75. When Lund reported the incident of possible back injury to Foster was asked if he wanted to file a written report. Lund declined. When other foreman suggested he report it, he did (Tr. 187).

76. Foster, who was not aware of the shovel incident nor aware of d's safety complaint to Johnson, stayed overtime to investigate the dent (Tr. 554).

77. Foster conferred with Kepner and Maderas before issuing the ety letter to Lund (Tr. 565, P-2).

78. The safety warning letter indicated Lund's actions violated an nax safety regulation by "lifting a shovel liner that was too heavy for person to lift when lifting equipment was available." Further, the ter stated that a repeated formal warning of "safety infractions" would d to disciplinary action (P-2).

79. Section 6 of Anamax's safety rules discusses handling materials. section A provides: "Do not lift bulky or heavy material by yourself, help" (R-2).

80. Foster, when he left the work area, told Lund to call him on the cable radio if he needed help (Tr. 550).

81. Johnson, Director of loss prevention, received a copy of the ter, talked to Lund, and investigated the incident (Tr. 789).

82. Johnson concluded that the letter had been properly issued (Tr.).

83. In Johnson's 15 years with Anamax two workers had been discharged receiving a safety warning letter (Tr. 790).

The issuance of a safety warning letter is an internal company safety cedure. The evidence here fails to establish that the issuance of the

do not find Lund's testimony credible which to the effect that he hand the liners alone for one and a half years prior to this incident (Tr. 189).

Accordingly, Anamax was justified in issuing Lund a safety letter his rebuttal evidence Lund says the portable radio issued to him was inoperable (Tr. 838). However, the gravamen of this claim is whether issuance of the letter was a disguised effort at retaliatory conduct. the reasons stated, I conclude it was not.

X

LUND'S GRIEVANCE LETTER PROTESTING THE SAFETY WARNING LETTER DISAPPEARS 13/

Witnesses: Lund, Nelson, Miller, Matthews

84. Al Matthews, a steward for the Operating Engineers at Anamax deposited a grievance letter for Lund in the grievance box in August, Lund was protesting the safety warning letter he received in IX (Tr. 1

85. Under the labor contract, a grievance procedure initially go the Anamax foreman. If the grievance is denied it then goes to the un chief steward (Tr. 13-14).

86. In three days Lund's grievance was denied. In accordance wi ordinary procedure, Matthews deposited the grievance letter for the Ch steward by depositing it in the locked union box situated at the Anama main gate (Tr. 14-16).

The chief steward, after removing the grievance, sets up an addit hearing in the union appeal process (Tr. 15).

87. The purpose of the union box is to pass notes between union stewards and the chief steward in the appeal process (Tr. 21, P-1).

88. Before any action was taken on the grievance and after an extended strike at the mine Lund contacted Anamax labor relations and advised they had not seen his grievance (Tr. 193).

89. Nelson, the acting chief steward, hadn't seen Lund's grievan and he checked with the other stewards who indicated they didn't have (Tr. 30).

90. Persons having access by key to the union box include manage and the chiefs stewards of the Operating Engineers, the Teamsters, the

91. After the strike a number of grievance letters could not be accounted for (Tr. 33).

92. Since Lund was not a union member he could go to one of three unions and they would be required to represent him (Tr. 28).

When mail is properly addressed and deposited in the United States mail, there is a rebuttable presumption of fact that it was received by th addressee in the ordinary course of mail, I Wigmore, Evidence § 95 at 524 (3d ed 1940); Weinstein on Evidence ¶ 406 (3).

Several difficulties prevent the rise of any presumption in this case First, Anamax and four unions have access to the box. Second, an 83 day strike intervened. Third, a number of grievance letters apparently were lost about the same time. Therefore, there is no presumption to explain what happened to Lund's letter.

Accordingly, there is a failure of proof that Anamax removed Lund's i retaliation for any protected activity.

XI

LUND'S DAMAGED TOOL BOX WAS
NOT REPLACED FOR TWO MONTHS 14/

Witnesses: Lund, Miller

93. Four to six weeks before the strike Lund requested that his tool box be replaced because it had been damaged. In accordance with Anamax policy, the company agreed to replace the box (Tr. 199, 443).

94. Miller ordered the tool box the same day Lund showed him his damaged box (Tr. 700, 702, 722).

95. During the strike Lund called Johnson who located the box in storage (Tr. 199, 701).

96. The tool box came into the company in about two months and it wa two or three weeks before it was brought to Miller's attention (Tr. 722).

I see no discrimination nor retaliatory action in the above facts. Anamax followed standard policy and agreed to replace Lund's tool box. Th order was placed. Anamax cannot be held responsible for a vendor's delay in delivering a tool box.

An inconsequential credibility issues arises in this incident. Lund says Miller told him the day before the strike that the tool box had not

LUND IS DISPATCHED ALONE, WITHOUT A RADIO, TO CUT AND WELD ON A PAIR OF SIDE FRAMES. HE FOUND FOUR HALF FILLED BUCKETS OF SOLVENT UNDER THE FRAMES 15/

Witnesses: Lund, Miller

98. On the first Saturday shift after the strike concluded (approximately November 1, 1980) shovel superintendent Shelley assigne Lund to do routine repairs on side frames resting on timbers (Tr. 202-P-19).

99. Lund would be using his torch and regular welding outfit to rebuild the framework (Tr. 204).

100. In looking over the area Lund found four clear five gallon b full buckets of solvent underneath the sideframes (Tr. 205).

101. Lund removed the buckets (Tr. 208).

102. The yard where the frames were located was somewhat of a jun yard and it was used for storage (Tr. 209-210).

103. Anamax's standard procedure permits welders to weld outside the shop without a radio (Tr. 210, 211, 447).

104. Lund didn't see anything in the yard that needed cleaning (T 211).

105. Lund considered it his responsibility as well as his foreman remove solvents from the area (Tr. 449).

Lund testified that these solvents had been set as a "trap" for h (Tr. 450) but foreman Miller's uncontroverted testimony is that it is customary for solvents to be in this area (Tr. 721). One would also solvents in an area where there were worn out parts.

Lund's claim of discrimination also lies in his stated but unple argument that it is discriminatory for a man to be assigned to a job without a radio. This matter is an internal business decision by Ana I will not upset such a business judgment unless the action by Anamax actually taken in retaliation for some protected activity.

15/ Paragraph 12 of the amended complaint

ragraph I is applicable here.

XIII

LUND IS REFUSED PERSONAL PROTECTIVE EQUIPMENT ON JANUARY 31, 1981, AND FEBRUARY 1, 1981 16/

Witnesses: Lund, Miller, Taylor, Hyder

MADERAS INCIDENT

106. On this occasion Whitmore lubricant was dripping into the area ere Lund was welding (Tr. 213, P-23).

107. Lund asked for personal protective equipment other than the pair leather shoulders. Maderas (Bissel's foreman) said "I'll think about ." Further, Maderas told Lund that "I like to see you get your pants rty" (Tr. 214).

108. Lund did the work and burned holes in his pants (Tr. 214).

109. Lund also asked for a mechanics paper protective suit and an bestos blanket (Tr. 214, 215, 450-451, P-20).

110. Lund made this request three times (Tr. 218).

TAYLOR INCIDENT

111. The following day, February 1, 1981, Lund was directed to weld a gear blank on the underneath side of an S-10 shovel (Tr. 218).

112. The grease lined gear box was seven to eight inches over Lund's ad.

113. Lund told supervisor Taylor that he needed protective clothing d ventilation (Tr. 218).

114. Taylor brought a fan but the A/C motor burned out on the D/C rrent of the welder (Tr. 220, 221).

115. Taylor didn't give Lund a paper suit. He further explained the zard of such suits to Lund (Tr. 534).

116. Welders are issued leather sleeves and gloves, small aprons, fety toe shoes, hard hat, glasses and a welding hood. Anamax replaces y damaged leather jackets, but it does not require them (Tr. 704, 706, 0).

55.15-7 Mandatory. Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal.

The issue here is whether Anamax discriminated against Lund in violation of Section 105(c). The issue is not whether the standard violated. I conclude Lund's complaint of discrimination fails.

The evidence in connection with the Maderas incident shows Lund for protective clothing. Maderas refused and Lund did the welding h burned his pants (Facts 106, 107, 108, 109). The availability of th jacket in the cage (Tr. 451-453) is not relevant to a determination issue. As indicated in paragraph 1 of this decision Lund was engage protected activity when he protested the lack of protective equipmer that point he could have validly refused to work. However, the Act is not intended to reward a worker for working under an unsafe condi Anamax did not further discriminate against Lund for engaging in his protected activity. Maderas remarks, certainly not the most pleasar to show that Maderas was discriminating against Lund for his protect activity in protesting the lack of personal protective equipment.

The Taylor incident does not involve a refusal to furnish prote clothing but rather it concerns a dispute over its use. Lund clearl testified he asked Taylor for ventilation and protective clothing (T 218). Taylor brought a fan (Tr. 220). However, Taylor refused to p a paper suit as he thought it would be more hazardous. Taylor expla the hazard to Lund (Tr. 534). Lund claims Taylor refused him protec clothing, (Tr. 220) but both Lund and Taylor agree that Lund obtaine used a paper suit (Tr. 221). Lund describes it as "tore up" and tha had been under the seat of his truck (Tr. 221). Taylor says Lund go from the weld shop (Tr. 534). The origin of the paper suit is not The ultimate facts establishes that Lund used protective clothing. Taylor's refusal does not show any discriminatory intent but rather dispute over the safety of the paper suit. If Taylor intended to re against Lund for his protected activities one would hardly expect th would secure a fan and argue over whether a mechanics paper suit cou safely used. In summary, no evidence of discriminatory or retaliate conduct is shown here.

XIV

LUND IS VERBALLY ABUSED BY SUPERVISOR DON NOEL 17/

Witnesses: Lund, Mattausch, Butler, Vanderburg, and Noel

118. On February 12, 1981, Lund, Vanderburg, and Mattausch wer discussing the shovel incident in the heavy equipment maintenance sh supervisor Don Noel walked up to the group (Tr. 73-75).

120. Mattausch and Vanderburg laughed, but Lund didn't (Tr. 80, 85).

121. Gerald Johnson is head of the Anamax safety department (Tr. 77).

122. Noel went into the office and he was talking to Lund's foreman concerning what Lund was doing and why he was talking to the two men, etc. (Tr. 237).

123. Lund interrupted, explained his work, and he made an issue about what Noel called him. Lund then left (Tr. 237-238).

124. It is the practice to swear in the maintenance shop and Mattausch had heard Noel swear before (Tr. 77).

125. After leaving the office Noel came to Lund and said he didn't mean it the way it sounded. He apologized (Tr. 94, 238).

126. Johnson, within a week, told Lund the insult was to Lund alone. Lund then filed a complaint. Johnson told Lund not to "smack" anyone (Tr. 238-239).

A credibility issue arises between Noel's and Lund's versions of this incident particularly as it relates to Noel's stated reason for referring to Gerald Johnson. Noel says he mentioned Johnson because his name just "popped into his head." I find the likelihood of that to be so remote as not to be credible. I find that Noel's remark was a rather clear reference to Lund's protected activities in protesting to the Anamax safety department. The legislative history indicates that the Congress intended to protect miners against not only the common forms of discrimination, [naming a few] "but also against the more subtle forms of interference such as promises of benefit or threats of reprisal." Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session 624 (July 1978).

The difficulty with Lund's position is that the statements by Noel does not constitute a threat of reprisal. It is not shown that any discriminatory action was taken by Noel against Lund. Noel's remark is not a threat, Cf paragraph VI, supra. It did not injure Lund or his employment in a way that Congress intended to prohibit. It was merely a derogatory statement which are commonplace among some workers. Congress in my view did not intend to legislative in the area of derogatory statements made in the work place.

Witnesses: Lund, Taylor, Rosenthal, Johnson, Bishop, and Weathers

The following events occurred in sequence.

125. On February 1, 1981, Lund was welding on a large conveyor (Tr. 240).

126. When supervisor Taylor appeared Lund said he had a foreign bod in his eye. Taylor took Lund to the Anamax aid station (Tr. 240).

127. Bishop, the emergency room technician, said he wasn't going to examine the eyes until they were washed out in the high pressure eye wash (Tr. 240-241).

128. After using the eye wash Bishop examined Lund's eyes with a large magnifier and he indicated he couldn't find any foreign object (Tr. 241, 242).

129. Lund's eye continued to bother him so he returned to the first aid room and Bishop took him to the hospital (Tr. 242).

130. Dr. Rosenthal, the emmergency room physician, without any magnification saw that Lund had a foreign body in his eye (Tr. 66-70, P-4).

131. It is inappropriate to use a high presure eyewash before the eye is examined (Tr. 70, 71).

132. Dr. Rosenthal anesthetized the eye, removed a one to two millimeter metallic body, and patched the eye (Tr. 68).

133. In the emergency room Bishop handed Lund a taxi slip. The company later pays for the worker's taxi fare home (10 miles). Lund asked for a taxi slip to get back to the mine (28 miles) to get his vehicle (Tr. 243, 244, 459, 640-644, 791, P-25).

18/ Paragraphs 16, 17 and 18 of the amended petition.

135. Lund asked Weathers, the security guard, to call Gerald Johnson his home. Weathers refused because Caylor was on duty, that is, he was charge of safety and health matters at that particular time (Tr. -652).

136. Bishop, an emergency medical technician, received forty hours of ining in that specialty. He also receives annual refresher courses (Tr. , 632).

137. It is Anamax's policy to furnish workers with a taxi slip to go n the hospital back to their residences (Tr. 639).

138. If an individual lives beyond the mine the company issues a taxi only to the mine (Tr. 646).

139. Bishop has given out approximately 24 taxi slips in the last 12 ths (Tr. 641).

There are two areas of credibility in this incident. Lund says Bishop n't examine his eye before telling him to use the eye wash. Bishop, to contrary says he "believes" he examined Lund's eyes before the wash. belief of a witness is far less persuasive than positive testimony. second area of credibility involves the conflict of whether Lund plained about the taxi slip. The evidence supports Lund's version.

I do not find that the three incidents involved here support a claim liscrimination nor retaliatory conduct. Taylor took Lund to the aid tion. Although the method of treatment was inadequate no evidence ports the conclusion that Anamax was retaliating against Lund. On the trary, Taylor took Lund to the aid station. Even though the treatment inadequate thereafter Bishop took him to the hospital.

In the hassle over the taxi slip, Lund's claim seeks to establish crimination based on Anamax's policy. Anamax's policy is to pay a ker's taxi fare from the hospital to his home. If the worker lives in direction of, and beyond the mine, then Anamax pays for the trip to the e (Tr. 791-792). Obviously, it is less expensive for Anamax to pay the ser amount. It is uncontroverted that Lund was treated the same as one else (Tr. 641). No discrimination nor retaliatory conduct arises in se circumstances.

Weathers, a security guard, refused Lund's request to call Gerald nson. Weathers refused because Caylor was "on duty" and in charge of ety and health (Tr. 651-652). A company policy cannot be faulted which nibits workers from contacting higher authority when a management person already "on duty."

Witnesses: Lund, Ypulong, Miller, Hyder

139. Lund observed that the seal of the nozzle of the fuel tank us to fuel his welder was leaking (Tr. 250).

140. Lund tagged it with a "DO NOT START" tag (Tr. 250, 707).

141. The next night the tag was off and Lund tagged it again and asked foreman Ypulong why it hadn't been fixed (Tr. 250, 734).

142. Ypulong said they couldn't get the parts (Tr. 251).

143. A week later the nozzle was still leaking. Lund was upset ar he didn't fuel his welder (Tr. 251).

144. The next day Lund called Johnson and threatened to call MSHA (Tr. 251).

145. Four hours later when Lund reported for work the leaking nozz had been repaired (Tr. 252).

Lund's activities as outlined above were clearly protected under th Act. However, no retaliatory action was taken by Anamax. Accordingly, claim exists under the discrimination section of the Act.

Lund's query on this complaint is why wasn't the leaky nozzle fixed sooner? The record does not directly answer this question. Indirectly, foreman Ypulong indicated the part had to be ordered. In any event, Lur position here is that he was required to work in an unsafe condition. T law in that area has already been discussed in paragraph I, supra.

XVII

LUND IS REFUSED SAFETY EQUIPMENT
BY FOREMAN BISSELL 20/

Witness: Lund

146. On this occasion Lund was assigned to do some pin keeper welc for Bissell (Tr. 253).

147. The pins were nine to ten feet off of the ground (Tr. 253).

19/ Paragraph 19 of the amended complaint.

149. The mechanics, at Lund's request, asked Bissell, apparently by radio, for a ladder. Bissell refused (Tr. 254).

150. Bissell told Lund to use the ladder on the shovel but Lund fel that the ladder was inadequate because it didn't furnish adequate support or balance (Tr. 254, 462, 463).

151. Lund took one of the mechanics radio and when he started to raise cain (about being refused safety equipment) one of the mechanics to off in the truck and returned with the ladder (Tr. 254-255).

Lund contends he was not given permission to take his truck and get the ladder he thought he needed, but the mechanic, who wasn't involved on the repair, was free to zip back and forth and pick up anything he needed (Tr. 255). Lund seeks to have the Commission interfere with Anamax's internal procedures. I am unwilling to do so. The protest of the inadequacy of a ladder was a protected activity under the Act. However, this incident, like all other alleged Bissell related incidents, if they show protected activity, they fail to show retaliatory conduct for the protected activity. Bissell was terminated by the company because his supervision was "inadequate." The mere inadequacy of a supervisory perso is not retaliatory conduct under the Act.

XVIII

ON APRIL 7, 1981 LUND ASSERTS THAT HE WAS REFUSED ACCESS TO THE TAPE HE MADE FOR GERALD JOHNSON CONCERNING THE SHOVEL INCIDENT 21/

Witnesses: Lund, Johnson

The details surrounding the tape, or tapes,22/ of the shovel incident are set forth in Facts 1 through 13, supra.

The only credibility determination here arises in connection with Lu declining a copy of the tape or a transcription of the statement he gave the safety department. Johnson says he declined the offer. Lund agrees declined the offer but he adds the proviso that he'd get them later, if h

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21/ Paragraph 21 of the amended complaint.

22/ The record is unclear whether Lund's 15 minute taped statment (Tr. 776) was recorded on one or more tapes. The decision accordingly at various times refers to "tape" or "tapes".

Anamax was under no obligation to preserve the tapes. Further, I find following facts to be credible:

152. Johnson didn't refuse Lund access to the tape (Tr. 780).

153. When Lund contacted Johnson for the tape in April 1981, John said he'd search for them (Tr. 780-781).

154. The tapes could not be located (Tr. 780-781).

155. Johnson didn't know if anyone had found the tape (Tr. 781).

Lund was available and testified about his statements on the tape. This was a protected activity but no evidence supports the view that th failure to produce the tape was in retaliation.

XIX

ON APRIL 8, 1981 LUND ALMOST LOSES HIS HAND BECAUSE OF INADEQUATE LOCKOUT PROCEDURES IN THE CRUSHER DEPARTMENT A DISCIPLINE LETTER IS THREATENED IF THE INCIDENT IS REPORTED 23/

Witnesses: Lund, Logan

156. At the time of this incident Lund was dispatched to work in secondary crusher building (Tr. 263, P-27).

157. Lund was with co-worker Harold Crumley (Tr. 264).

158. Crumley was shown by another person where to place his lock lock out the equipment (Tr. 265).

159. Lund placed a patch to see if it would fit. The patch fell inside. Just as he pulled his hand out after retrieving the patch, 500 600 pounds of muck slid down the chute (Tr. 265, P-28).

160. The muck fell right where Lund's hand had been (Tr. 265).

161. The man upstairs said the east unit wasn't locked out (Tr. 260).

162. The people above were calibrating equipment and they showed Crumley where to lock out the equipment (Tr. 267).

23/ Paragraph 22 and 23 of the amended complaint.

164. Logan was first made aware of this incident when an MSHA complaint was filed (Tr. 658).

165. Logan didn't threaten Lund about the issuance of a safety letter for such an incident (Tr. 660).

We will consider the dual complaints in reverse chronological order.

The second issue is whether there was a threat of retaliation if the incident was reported. A credibility issue arises over whether there was such a threat. That is, did management threaten a safety letter if the incident was reported. I am not persuaded by Lund's evidence. It is triple hearsay because hourly workers stated to Crumley that if Crumley or Lund made "trouble" they'd get safety letters and apparently Crumley related the statements to Lund. A further difficulty with the credibility of the triple hearsay statement is the fact that, according to Lund, "supervision had left" when this incident occurred (Tr. 267). Logan came on the job after the incident, and I accept his testimony that he did not threaten Lund with the issuance of safety letter (Tr. 660). In fact, his first knowledge of the incident was when an MSHA complaint was filed. This view is confirmed by Lund's testimony to the effect that no one came to him and said, "I'm going to issue a safety letter" (Tr. 467).

The primary issues are whether Lund was engaged in a protected activity and whether Anamax took retaliatory action. Lund was working as a welder in his ordinary activity. No protected activity was involved. Lund seeks to prove that the falling muck occurred as a result of his statements to the safety department, but no evidence supports that view. Quite to the contrary, whoever put the conveyor in motion and apparently thereby released the muck was on the floor above where Lund and Crumley were working. There is no showing that persons on a different floor could even have known of the presence of Lund and Crumley.

Lund contends discrimination occurred here because these two incidents were not "sorted out" when Lund wanted to have them investigated (Tr. 465). No further evidence is offered in support of the argument of how the two instances were not "sorted out", and since I find no protected activity nor retaliatory conduct, it follows there is no merit to the argument.

XX

LUND IS GRANTED EMERGENCY MEDICAL LEAVE TO BE PRESENT AT THE BIRTH OF HIS CHILD; THE LEAVE IS THEN REVOKED. FURTHER, AN ATTENDANCE DISCIPLINE IS ISSUED AFTER LUND'S ABSENCE 24/

asked supervisor Rael for a couple of days [or half a day] of em
leave (Tr. 275).

167. Supervisor Nelson called back and said he thought it
all right (Tr. 275).

168. Later, Nelson called Lund again and said Lund couldn'
leave he'd previously approved. The reason given by Nelson was
not in accordance with company policy (Tr. 275-276).

169. For being absent while he took his wife to the hospit
received an attendance letter (Tr. 277, P-26).

170. Lund didn't know of anyone else at Anamax who had bee
permission to be with their wife at the birth of a child and who
charged with an absence that would count against their attendanc
(Tr. 468).

171. Nelson treated Lund the same way as any other miner.
would be without pay and he would be charged for the days he was
(Tr. 612).

172. The Anamax written absentee control policy is dated J
1977.

173. Anamax has three classes of absences: AWOL, chargeabl
chargeable (Tr. 499).

174. A worker is AWOL if his absence is unexcused. Five u
absences results in termination (Tr. 499).

175. A worker is allowed 16 chargeable absences in 12 mont
8th absence the worker receives a verbal warning, at the 10th an
absence he receives a written warning; at the 14th absence the w
suspended for 3 days (Tr. 500).

176. Non-chargeable absences include jury duty, witness su
labor agreement, military leave, funeral leave, union business,
holidays, and absences due to industrial accident or injury (Tr.
R-7).

Lund's complaint is that Nelson granted him an emergency m
leave and then revoked it. The requesting of medical leave is n
activity protected under the Act. Further, Anamax did not, in a
discriminate against Lund. Anamax merely advised him on April 2
that he had been charged with 13 absences and in the event there
more absence he would be given a three day suspension (P-26). A

icy requires discipline at the 10th and 12th excused but charged sence. Lund agreed that his 13th day of absence was the day he took his e to the hospital (Tr. 469). The only "discipline" was charging Lund the day he missed. No further suspension occurred. Anamax's activis were in accordance with its attendance policy and, therefore, no crimination is shown.

XXI

ON MAY 1, 1981 LUND IS DISPATCHED BY LOGAN TO WORK AT THE INTERSECTING CONVEYOR BELTS UNDER UNSAFE WORKING CONDITIONS 25/

Witnesses: Lund, Logan, Miller

178. Logan dispatched Lund to work on intersecting conveyor belts wn as W-1 and R-1. Their duties included cleaning muck out of the ttle (Tr. 279-281).

179. Lund and co-worker locked out the equipment in the lockup shack . 280, Exhibit P-29).

180. After working for approximately two hours in the chute, a beltler (trouble shooter) asked Lund if he had locked out the shuttle (Tr. , 289, Exhibit P-26, P-30, P-31).

181. When Lund requested an additional lock, an electrician came and talled a "tree" with a lock on it. Lund refused to get back in the ttle until the conveyor was locked out with a lock to which he had the y key.

182. Lund explained the situation to Logan who had Lund write out on iece of paper why he was refusing to work (Tr. 285).

183. Lund refused Logan's request to leave his lock and at that cture Logan told Lund to load up. Logan sent Lund to a different job . 287).

184. Logan told Lund he was taking the issues to a safety committee see who was right (Tr. 287-288).

185. Approximately two to four weeks later a new Anamax policy ulted in each welder being issued two locks to prevent this situation ccurring (Tr. 288, 711).

The credible evidence establishes that Lund was engaged in a protected ivity when he refused to work in the chute. His arguments to Logan were

Lund claims he was discriminated against because he was yelle hollered at and he was working under unsafe conditions that the su thought were safe without Lund being given a fair hearing on the c (Tr. 287, 288, 473).

The evidence does not show retaliatory action by the company. facts here rebut any harassment of Lund that is subject to redress the Act.

The fact that Lund was working under an unsafe condition for mately two hours was not discriminatory conduct for the reasons di in paragraph I, supra.

XXII

LUND RECEIVED ATTENDANCE DISCIPLINE LETTER AND THREE DAY SUSPENSION. HE CONTENDS THE SUSPENSION SHOULD NOT HAVE BEE ISSUED BECAUSE MANAGEMENT KNEW HE HAD BEEN INJURED ON THE JOB

Witnesses: Lund, Johnson, Pijanowski,

186. According to Anamax's policy an industrial accident is chargeable against attendance (Tr. 303, 506).

187. Anamax policy requires a worker to immediately report a to his supervisor (Tr. 105, 793).

188. Lund claims he was injured on the job on May 12, 1981, lifted a handrail over his head. Lund filed his report of the inj May 24, 1981 (Tr. 597, 796, Exhibits P-32, R-16).

189. Due to Workmen's Compensation, Anamax requires immediat reporting of any accident (Tr. 793, 794).

190. On May 18, 1981 Lund received a three day disciplinary notice due to his attendance. He was suspended for three days bec had been charged with 14-1/2 absences in the prior 12 months (Exh.

191. Lund called in each day that he didn't work after the i incident. He told the guard he felt he couldn't work and he was g the doctor (Tr. 298, P-33).

26/ Paragraph 27 of the amended complaint.

ne enforcement of the Anamax absentee policy, discussed in XX, supra.

In paragraph IX, supra, Lund orally reported an accident and filed a ritten report the night of the incident (Facts, ¶75). At the time of this ncident, in July 1980, Lund knew of Anamax's requirements concerning ne filing of an accident report. In May 1981 he didn't file the report ntil 12 days later. In addition to the late filing Lund's co-worker James ohnson "didn't recall" that Lund ever claimed to have incurred any injury n lifting the 25 pound handrail (Tr. 100). In short, I conclude that Lund ailed to prove that his back injury occurred on the job.

XXIII

LUND IS THE SUBJECT OF VERBAL ABUSE BY SUPERVISOR LOGAN AND LOGAN FURTHER DEFAMES LUND'S ABILITY AS A CRAFTSMAN 27/

Witnesses: Lund, Hall, Vidal, Logan

192. Twice on the same day, Vidal heard Logan call Lund "dung" (Tr. 07, 308).

193. On other occasions Logan said to Lund words to the effect that who down there [in welding] hates me that they'd send me you for a welder Tr. 110, 313-315).

194. These statements upset Lund (Tr. 308).

195. Before June 1, 1981 this occurred less than ten but more than ive times (Tr. 314).

Logan concedes he called Lund "dung" 28/ a dozen times over a year ut he indicated Lund had not objected. When Lund protested Logan ologized and stated he wouldn't call him that again. Logan didn't recall ver making any disparaging remarks concerning Lund's skill as a welder. e considered him an "excellent" welder (Tr. 678 - 679).

7/ Paragraphs 28 and 29 of the amended complaint.

8/ Webster's new Collegiate Dictionary 1979 defines "dung" as follows: 1. he excrement of an animal: MANURE 2. something repulsive.

"doesn't recall" any disparaging remarks [illegible]
Lund's favor because of Logan's failing memory on this issue.

The statements by Logan are derogatory in nature but they do
to the level of a threat of reprisal. In short, Lund is not prot
the Act against such statements.

XXIV

A VANDAL DAMAGES LUND'S CAR AND HE MISSES WORK. ON HIS RETURN HE IS QUESTIONED BY TWO ANAMAX FOREMEN AND HE RECEIVES AN ATTENDANCE DISCIPLINE LETTER FOR THE WORKDAY HE MISSED. 29/

196. On June 13, 1981, while Lund's automobile was alongsid
trailer home in Tucson, Arizona, someone placed a jumper cable ac
ignition wires and burned the wiring in his car (Tr. 316).

197. Lund didn't know who vandalized his car (Tr. 477-478).

198. Lund's repairs cost were $524.53 (Tr. 319).

199. Lund received an attendance discipline letter for his
appear at work on June 13, 1981 (Tr. 320).

200. Lund was apparently not docked a day without pay (Tr.

A credibility issue arises whether the facts are as outlined
whether Lund burned up the car when he was jumping the battery as
allegedly told the foreman (Tr. 713). I find this issue in Lund'
since he offered his insurance card to the foreman (Tr. 713). Fu
hearsay statement of the automobile service manager is to the eff
someone had been tampering under the automobile's dash (Tr. 320).

A resolution of the credibility issue here does not resolve
incident since the evidence utterly fails to connect Anamax with
vandalism of Lund's automobile. Accordingly, any claim of discri
in connection with that allegation should be dismissed.

Lund also contends he was discriminated against because of t
tremendous amount of attention paid to the incident by his superv
477-478). However, Lund offers no supporting detail other than t
that he was questioned by Logan about his absence (Tr. 479, 480).
uncontroverted that Logan gave Lund an "excused absence". Any in
at best enforcement of rules concerning absences. In short, Lund
establish a claim of discrimination by merely showing that Dayton

testimony credible which is to the effect that the next day when Lund came to work he questioned Lund as he would any other employee (Tr. 712).

The final portion of the claim of discrimination in this incident deals with the attendance discipline letter. I find a failure of proof in this regard. At one point Lund stated he received a discipline letter for failing to appear on June 13 (Tr. 320). However, as the Judge further developed Lund's testimony he stated he wasn't issued such a letter, but he was assessed a day's absence (Tr. 321). Lund's direct testimony is totally conflicting and for this reason his proof fails. Even if Lund had received an attendance letter it would have been in furtherance of the Anamax attendance policy, discussed in paragraph XX, supra. If a worker misses a day an operator may legitimately assess him for the day he missed.

XXV

LUND ALLEGES A THREAT BY DAYTON MILLER IN THAT HE HAD TO BE SUBPOENAED TO APPEAR FOR A PRE-TRIAL HEARING IN THE INSTANT CASE OR HIS ABSENCE WOULD BE COUNTED AGAINST HIS ATTENDANCE RECORD. 30/

Witnesses: Lund, Pijanowski

201. On July 2, 1981 Lund asked Dayton Miller that he be excused from work to appear at a prehearing conference in the instant case on July 14, 1981 (Tr. 324, 325).

202. Nelson told Lund he wouldn't be given an excused absence unless he was subpoenaed (Tr. 325, 480-481).

203. Whether an absence is excused or unexcused is a matter within the discretion of the hourly worker's supervisor (Tr. 326).

204. When the prehearing conference took place Lund was working the graveyard shift which did not conflict with the prehearing schedule. Accordingly, his attendance record at Anamax was not adversely affected (Tr. 326).

The evidence is uncontroverted that during the 1977 labor negotiations Anamax and the union discussed and agreed that an appearance pursuant to subpoena at a hearing in a court of law for a municipality, a county, a state, or a federal court would not be a chargeable absence. The negotiators also discussed administrative hearings. MSHA was not mentioned but NLRB, EEOC, Workman's Compensation, state unemployment, etc., were a part of the union demand. The demand was not met and the net result is that appearances before an administrative hearing are a chargeable absence (Tr. 505-507).

affect on his employment record, namely an unexcused absence is charged. This policy then could have a chilling effect on a miner's willingness to institute a proceeding under the Act. Lund's appearance before the Judge was protected activity. However, the pre-hearing conference did not take place during Lund's work shift and consequently, he was not required to take time off from his job in order to attend the conference. Anamax's policy was not enforced against Lund, and, therefore, notwithstanding the validity of the policy under the Act, Lund suffered no discrimination because of it.

XXVI

AN ANAMAX SAFETY OFFICIAL REFUSES LUND'S REQUEST TO ISSUE A SAFETY LETTER TO SUPERVISOR LOGAN. 31/

Witnesses: Lund, Logan, Caylor, Johnson

205. On July 5, 1981 Lund's supervisor Hassell Logan climbed a structure and welded a ladder in place as he stood on a cross member of t structure (Tr. 327, 680).

206. Lund's complaint to the safety department was that a supervisor had climbed the tower without tying off with a safety belt and lanyard. The climbing was done over Lund's head (Tr. 327, 593, 690).

207. The day following this incident Lund contacted John Caylor in t Anamax safety department. Lund requested that a safety letter be issued Logan (Tr. 330).

208. Caylor told Lund, and he reiterated at trial, that Anamax has n policy authorizing an hourly employee to issue a safety letter to a supervisor (Tr. 330, 592, 593).

209. Caylor took Lund's safety complaint and investigated the incident (Tr. 593).

210. Caylor found that Logan was 12 feet off the ground (outside measuresment) and unsecured while he welded the ladder. On the inside of the structure Logan was four to five feet off of the ground.

31/ Paragraph 33 of the amended petition.

It is not necessary to decide in this case whether Logan violated the MSHA standard promulgated at 30 C.F.R. 55.15-5. The standard provides:

> 55.15-5 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The issue is whether Anamax discriminated against Lund. I conclude no such discrimination occurred. Lund's theory is that the company policy (or lack of it) denies him recourse while being required to work under a supervisor in these circumstances. I reject Lund's theory. If an hourly employee had authority to issue a safety letter the results in a mine could well be chaotic. Under the Act, Lund had a right to complain about the unsafe act to Logan. He didn't do so at the time (Tr. 683). Further, he had the right to refuse to work under the circumstances. In addition, he had the right to complain to the safety department or to a joint safety and health committee.

The issuance of a safety letter is an administrative matter resting in the management discretion of Anamax. On its face the Anamax safety policy appears viable. The uncontroverted evidence shows that Anamax has some 1500 to 1600 employees (Tr. 603). The safety department has three safety inspectors in the field and three industrial hygenists (Tr. 602). The safety department receives about 100 to 150 complaints over a 12 month period (Tr. 601-602). A safety and health committee must resolve complaints about once a week (Tr. 601).

A careful study of the record might lead one to the conclusion that Lund did not want to issue a safety letter to Logan but merely wanted to cause the safety department to issue such a letter and advise Lund of the accomplished fact (Tr. 484, 485). I conclude, under the circumstances here, that in either event, a company policy that does not require the issuance of safety letters to supervisory personnel with hourly employees being advised of that fact does not form the basis of a discriminatory complaint by an hourly worker. Lund's safety complaint was protected activity, but no adverse action was taken against him in retaliation for such protected activity.

XXVII

LOGAN TAKES LUND'S OPERATOR REPORT 32/

Witnesses: Lund, Logan

205. An operator's report is filled out when a worker operates a piece of equipment such as truck (Tr. 336-337).

207. Logan took Lund's report because he wanted the list of ma
Lund had put on the back of the form (Tr. 685-686).

208. The materials were to be for the workers on the following
(Tr. 685-686).

209. Logan overrode Lund's protest and told him he'd see that t
report got into the proper hands (Tr. 686-687).

A minor credibility issue arises here. Lund "didn't recall" whe
there was anything written on the report but Logan says it had a list
materials for the subsequent shift. I have resolved this credibility
determination in favor of Logan due to Lund's failure to recall.
However, neither version establishes any retalitory conduct by Logan.
felt he had to have the report or he'd "be in trouble" (Tr. 340-341).
These events occurred the day after Logan climbed the tower, (in XXVI
but no retaliatory conduct is shown.

XXVIII

LUND ASSERTS HE IS SENT HOME WHEN HE COMPLAINS ABOUT FUME INHALATION. HE IS ALSO CHARGED FOR ONE DAY ABSENTEEISM AND NOT PAID FOR THE REST OF THE DAY. HE CLAIMS THIS IS CONTRARY TO ANAMAX POLICY. 33/

Witnesses: Lund, Miller, Ypulong, Nelson, Pijanowski

210. On July 6, 1981 Lund inhaled fumes while sodering with sil
(Tr. 341, 486).

211. The following morning he experienced profuse sweating and
vomiting (Tr. 341).

33/ Paragraph 35 of the amended complaint.

213. Lund reported for work at 3 p.m. and before 4 p.m. he reported to Dayton Miller that he was sick and dizzy (Tr. 343).

214. Miller told Lund he was responsible for him, and they didn't want him driving a truck if he felt that way (Tr. 343, 717).

215. He was sent home on July 7 at approximately 4 p.m., after one hour's work (Tr. 343).

216. Lund wasn't paid for the seven hours he didn't work on July 7, and he was assessed a full day's absence (Tr. 345).

217. When a worker is sent home because of an industrial accident it is Anamax's policy to pay the worker's wages for the balance of that day (Tr. 505).

218. Subsequent days, after an injury, are covered under workman's compensation (Tr. 505).

219. If a worker is injured and does not leave work that day but returns the following day and then goes home because of the injury he receives no pay for the second day other than for hours actually worked on the second day (Tr. 506).

The uncontroverted evidence indicates there is a reasonable basis for the Anamax wage policy on the date of an injury and on subsequent days. The facts in this incident fail to show any discriminatory conduct against Lund. Further, Lund offered no evidence to establish that he was treated differently than any other worker under similar circumstances.

XXIX

LUND ASSERTS MILLER THREATENED HIM ABOUT HIS ATTENDANCE AT THE PRE-TRIAL HEARING IN THE INSTANT CASE ON JULY 13, 1981 AND THAT IT WOULD RESULT IN ANOTHER THREE DAY SUSPENSION WITHOUT PAY. 34/

Witnesses: Lund, Miller

220. Lund was told that if he took off from the graveyard shift to attend the pre-hearing in the instant case he would be assessed for one da for being absent (Tr. 347).

221. Lund was warned that he could incur an additional three day suspension (Tr. 348).

A credibility issue arises here. Lund says that with each conversation he felt "intimidated and harassed" (Tr. 348). However, Miller says he didn't threaten Lund, but when Lund brought in the subpo he checked his attendance record and he stated he had 13-1/2 days and i missed one more day he would get three days off without pay (Tr. 714).

Lund may have felt intimidated and harassed but no collateral fact support his conclusion. A foreman may advise a worker of his attendanc record without that forming the basis of a discrimination complaint. T uncontroverted evidence from Miller is that he treated Lund the same as worker (Tr. 714). As previously noted (XXV) the Anamax policy is inherently discriminatory. However, Lund was not adversely affected by that policy because he was working the graveyard shift and at the completion of that shift he attended the pre-hearing conference. To sustain Lund's position here would mean that an operator would be requi to give a worker time off to prepare his case. Neither the Act nor the legislative history support such a proposition.

TRIAL SANCTIONS

During the trial Lund asserted that Anamax failed to comply with t Commission order authorizing him to take photographs. In addition, Lun claimed that witnesses had been told not to appear at the hearing (Tr. 117). Lund's complaints were treated in the context of a request by hi for the Judge to impose sanctions on Anamax.

I conclude that Anamax did not interfere with the Commission's ord and I decline to impose sanctions. Lund offered in evidence and the Ju received 25 photographs. Lund alleges that Anamax interfered and refus his right to take photographs. (Tr. 358). Particularly, Lund says he d not have an opportunity to photograph the weld truck involved in V; in addition, he wanted to photograph the conveyors in XXI while the convey were stopped. Finally, he wanted a posed picture of a man cutting and welding.

The photographs taken by Lund fairly illustrate his testimony: a different weld truck was photographed as well as different conveyor bel Lund did not state and I am unable to find why a posed picture of a wor welding was necessary in his proof. I conclude that the Commission discovery order did not require Anamax either to shut down its producti or to furnish the exact vehicle for photographs.

During the trial Lund further stated that witnesses had been told to appear at the hearing. Ultimately the facts on this allegation boil down to one witness, Rudy Ypulong, who was allegedly told not to appear

would be called by respondent. No evidence supports Lund's allegations that Anamax told any witnesses not to appear at the hearing.

Finding no basis for Lund's allegations, I refuse to impose any sanctions against Anamax.

POST TRIAL MOTIONS

The trial of the above case concluded on August 27, 1981 in Tucson, Arizona.

On September 21, 1981 Lund filed a letter with the Judge. In its relevant portions he inquired as to penalties for perjury before the Commission. He claimed that a supervisor had lied on the stand and was considering a recant. Further, Lund inquired as to how he should treat false documentation before the Judge concerning the Anamax safety rule book and the "real" burn permit. Further, Lund asserted he had been discharged by Anamax.

Anamax objected to Lund's communication, moved to strike it, and further moved for an order to prohibit Lund from any further attempts to supplement or confuse the record.

On September 29, 1981 an order was entered treating Lund's letter as a motion to reopen the record. In the order the Judge indicated he would reopen the record if there was a material defect in the trial proceedings. The order further stated that Lund's motion lacked a factual basis to determine its validity and Lund was granted additional time to supplement his motion.

When he supplemented his motion Lund offered seven items. The initial two items are a burn permit and an Anamax safety book.

The burn permit was involved in factual discussion in XII (five gallons of solvent under sideframes, half filled). The Judge understands this evidence and the receipt of what Lund calls the "real" burn permit does not affect the result in XII, supra. A burn permit as a cutting/welding permit that addresses fire hazards.

Lund asserts the Anamax safety booklet received in evidence (R-2) contains a different lockout procedure that the one in effect relating to XIX (Lund almost loses hand) and XXI (intersecting belts). Facially there does appear to be a minimal difference in the revised safety book publications but in any event the results in XIX and XXI would not be affected by the new evidence, even if true.

Items 3, 4, and 5 are MSHA citations and they are offered by Lund to

the facts as already found in XXVI. Further, such evidence would be repetitious.

Items 6 and 7 relate to Lund's termination by Anamax. This event occurred after the testimony was concluded in this case. Since it was not an issue raised in the trial I refust to consider it or to reopen the record to receive evidence thereon.

On October 27, 1981 the Solicitor for the Department of Labor under the Freedom of Information Act requested a copy of the transcript in this case "in order to complete his investigation of a subsequent complaint of discrimination filed by Mr. Lund."

Lund's supplemental motion to reopen the record did not identify the witness who perjured himself nor were further facts mentioned to support Lund's allegations of perjury.

For the reasons stated I refuse to reopen the record on the basis of Lund's supplemental motion.

CONTENTIONS IN POST TRIAL BRIEF

Lund's post trial brief raises various issues. They will be treated as they appear in his brief.

Lund's initial contentions are that he was engaged in a protected activity, and he was the object of discrimination by the supervisors of Anamax. I agree that many of Lund's activities were protected by the Act but for the reasons indicated I find no retaliatory conduct by Anamax against Lund. Since I did not find any discrimination I reject Lund's position that he sustained financial loss.

Lund's further contention involves the credibility of the testimony of various witnesses.

Lund attacks the testimony of Ypulong concerning his qualifications to discuss the construction of the handrail involved in XXII. The ultimate construction of the handrail has virtually nothing to do with the determination and conclusions in that paragraph. Lund also complains about Pijanowski's testimony concerning numerous "unwritten" Anamax policies. I find such "unwritten" policies do not destroy the credibility of the Anamax case even when such "unwritten" policies are asserted as a defense. The evidence on these issues is essentially uncontroverted. Many of the Anamax policies are written.

Lund's attack on the burn permit was discussed, supra, in his motion to reopen the record and the same ruling applies here.

protects his refusal to work.

Lund states that the supervisors had a motive for their discriminatory conduct since Johnson played the taped testimony he gave to the safety department. As previously stated I have found no retaliatory conduct against Lund by Anamax's supervisors.

Lund also contends management treated him in a degrading and humiliating manner. Further, he never received this kind of treatment until he made his original safety complaint or became involved with MSHA.

This contention has already been reviewed. In summary I have reached contrary conclusions. Lund's claims fail for the reasons previously stated.

Lund's further argument relates to ¶ XXVI (safety letter refused for Logan). He claims Logan's reprimand was minimal and private but his discipline was public. Lund's facts do not support his allegations. The only discipline he ever received for safety was the letter outlined in ¶ IX, supra.

Lund's further argument addresses the events of the telephone calls at the hospital. These contentions have already been reviewed in ¶ XV, supra. The same ruling pertains.

Lund attacks Logan's testimony regarding the lockout procedure (¶ XXI, supra), (intersecting belts). As previously indicated no conflict exists on the facts. The only conflict is whether Lund or Logan was correct in the lockout procedures. Subsequent procedural changes by Anamax indicate Lund was correct. This does not indicate that Logan lied.

A further argument relates to Lund's asserted intimidation about his attendance at the pretrial hearing. These issues were discussed contrary to Lund's view in ¶ XXV, and XXIX, supra.

The further argument is that the personnel files Lund requested for his case were incomplete, incorrect, and illegible. Lund did not prove the first two allegations and the Judge gave him ample opportunity to discuss with Anamax's counsel and to secure copies of any documents that he thought were illegible. The two files sat on the court bench throughout most of the hearing.

Lund's additional argument centers on the photographs. This issue was discussed under "Trial Sanctions."

A further argument focuses on the apparent reprinting of the Anamax safety booklet. This was discussed under the "Motion to reopen the

"documentation" nor does he claim to be prejudiced by any delay if there was any.

The further proposition Lund urges is that Anamax did not surrender the cassette tapes. This was discussed and decided in ¶ XVIII, supra. In view of my prior discussion I conclude that the order to produce the cassette was unprovidently issued and it is vacated. Lund was able to testify at length as to the nature, scope, and context of his statements to the Anamax safety department. No issue of fact arose in the case involving the tapes. Lund therefore suffered no prejudice because of the unavailability of the tapes.

Lund further argues that Anamax's counsel, Steven Weatherspoon, was a major obstacle for him to deal with in the presentation of his case. He complains of Weatherspoon's defiance of Commission orders, profane language, conduct he considers unethical, refusal to surrender evidence, and false documentation. He also moves for disciplinary proceedings against Anamax's counsel.

Lund's arguments involving Anamax's counsel have already been reviewed in connection with the photographs at the mine, or in connection with his motion to reopen the record. While the Commission may discipline practitioners before it, 30 C.F.R. § 2700.80, there is no factual basis to support Lund's contentions. In all proceedings herein Steven Weatherspoon conducted himself in accordance with the highest standards of ethical conduct required of practitioners before this Commission. However, in view of Lund's allegations the Judge reviewed his depositions on file with the Commission. The depositions were taken on August 14, 1981 and August 21, 1981. Nothing in the depositions support Lund's contentions. For these reasons I deny Lund's motion to discipline Counsel for Anamax.

SUMMARY

The record supports Lund's position that he had a reasonable belief that various safety hazards existed at the Anamax mine (particularly in paragraphs I, II, V, XII, XIII, XVI, XIX, XXI, XXVI). Further, the Congress intended that miners would play an active part in the enforcement of the Act. However, even in those situations where a safety hazard existed the record fails to establish retaliation against Lund because of his concerns about safety. Without retaliatory conduct on the part of Anamax in response to Lund's protected activity no discrimination can occur under the Act.

Based on the foregoing findings of fact and conclusions of law I hereby enter the following:

2. The motion to reopen the record is denied.

3. The motion to discipline Steven Weatherspoon, counsel for espondent, is denied.

John J. Morris
Administrative Law Judge

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FEB 5 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLYDE SMITH, JR., JAMES R. CLEVENGER, MONROE MULLINS, DAVID MAY, JERRY LEE SMITH, JOHN R. TELFER, JR., JAMES THACKER, H. K. TILLEY, JR., AND THOMAS W. WALKER, Complainants	:	Complaint of Discharge, Discriminat or Interference
	:	Docket No. KENT 81-17-D
	:	No. 1 Mine
v.	:	
MULLIN CREEK COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. De ment of Labor, for Complainants;
Charles E. Lowe, Esq., Lowe & Lowe, Pikeville, Kentucky, Respondent.

Before: Administrative Law Judge Steffey

Two hearing sessions were held in the above-entitled proceeding. first hearing was held on March 6 and 7, 1981, in Pikeville, Kentucky, a pertained only to the merits of complainants' contention that they had b discharged in violation of section 105(c)(1), 30 U.S.C. § 815(c)(1), of Federal Mine Safety and Health Act of 1977. A bench decision was mailed the parties on March 17, 1981. The bench decision found that all nine c plainants had been discharged in violation of section 105(c)(1) of the A and paragraph (B) of the bench decision provided for reinstatement of th four miners who had requested reinstatement and paragraph (C) of the ben decision ordered respondent to make payments of back pay to all nine com ants. Paragraph (G) of the order accompanying the bench decision provid for an additional hearing for the purpose of determining the facts requi to compute back pay. The second phase of the hearing in this proceeding held on November 17, 1981, in Prestonsburg, Kentucky, and a 17-page orde was issued on January 12, 1982, setting forth the methodology to be used computing back pay.

Counsel for the parties filed on February 1, 1982, two letters show that counsel for the parties agree to the correctness of the calculation back pay computed by complainants' counsel. The parties have not raised

(A) The 16-page bench decision mailed to the parties on March 17, 198 is confirmed and hereby issued as the final decision on the merits of the discrimination charges alleged in this proceeding.

(B) The final decision in this proceeding is comprised of: (1) the 16-page bench decision confirmed in paragraph (A) above, (2) the two-page Order Granting Request for Extension of Time, (3) the 16-page Order Providir for Computation of Back Pay, and (4) the six-page Appendix made up of lette from the parties agreeing to the computations of back pay.

(C) Paragraph (B) of the bench decision is confirmed, to wit, the Com- plaint of Discharge, Discrimination, or Interference filed in this proceedir on October 24, 1980, is granted for the reasons given in the bench decision confirmed in paragraph (A) above.

(D) Paragraph (B) of the bench decision is rescinded as moot because respondent has already reinstated all of the complainants who wished to be reinstated.

(E) Paragraph (C) of the bench decision is rescinded as moot because back pay has been computed and payment is awarded in paragraph (J) below.

(F) Paragraph (D) of the bench decision is rescinded as moot because respondent has already provided the basic data required for computing back p

(G) Paragraph (E) of the bench decision is rescinded as moot because the parties have already participated in the gathering of the necessary data for computing back pay.

(H) Paragraph (F) of the bench decision is confirmed, to wit, the employment records of all nine complainants shall be completely expunged of all references to their unlawful discharge and matters relating thereto.

(I) Paragraph (G) of the bench decision is rescinded as moot because counsel for the parties have already requested a reconvening of the hearing for the purpose of determining back-pay data, the hearing has already been held, and the amount of back pay due to each complainant has been computed.

(J) Respondent, within 30 days from the date of this decision, shall p each complainant the amount set forth after his name in the tabulation belov together with interest at 12 percent per annum.

(1)	Thomas V. Walker	$16,226.95
(2)	John R. Telfer, Jr.	15,979.90
(3)	Clyde Smith, Jr.	10,478.15
(4)	James R. Clevenger	26,410.30
(5)	Jerry Lee Smith	17,082.30

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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The 16-page bench decision reproduced below was mailed to the parties on March 17, 1981, and is confirmed by paragraph (A) above as the final decision on the merits of the discrimination charges raised in this proceeding.

This hearing involves a Complaint of Discharge, Discrimination, or Interference filed on October 24, 1980, in Docket No. KENT 81-17-D by the Secretary Labor and the Mine Safety and Health Administration on behalf of nine coal ers, namely, Clyde Jr. Smith, James R. Clevenger, Monroe Mullins, David May, ry Lee Smith, John R. Telfer, Jr., James Thacker, H. K. Tilley Jr., and mas V. Walker, pursuant to section 105(c)(2), 30 U.S.C. § 815(c)(2), of the eral Mine Safety and Health Act of 1977, alleging that complainants were egally discharged by Mullin Creek Coal Company, Inc., on or about April 10, 0, because they had withdrawn from Mullin Creek's No. 1 Mine and had refused produce coal from an area of the mine having allegedly unsafe and hazardous f conditions.

The issues raised by the Complaint are whether respondent violated sec-

Findings of Fact

1. The No. 1 Mine of Mullin Creek Coal Company, Inc., has two working sections. On April 10, 1980, when most of the events resulting in the filir of the Complaint in this proceeding occurred, a continuous-mining machine wa being used in one section and conventional mining procedures were being used in the other section. The men using the conventional equipment were engaged in secondary mining or the extracting of pillars. Two production shifts per day were used in the pillar-recovery section. Respondent has stipulated tha it is subject to the provisions of the Act and to the regulations promulgat thereunder.

2. Jerry Lee Smith was the operator of the roof-bolting machine on the 3-p.m.-to-11-p.m. shift and had worked at the No. 1 Mine for about 1 year prior to April 10, 1980. He left the mine about 6 p.m. on April 10 because he claimed that hazardous conditions made it unsafe for him to work. He described the unsafe conditions as an absence of the proper number of breake posts, excessively wide bolting places, and lack of timbers for use as line posts or roadway posts. He claimed that such wide cuts of coal had been tak from the No. 2 and No. 3 pillars, that he had to install 32 bolts on 4-foot centers instead of the 15 bolts which would have been required if excessivel wide cuts had not been taken. Smith also refused to install bolts in the No. 7 pillar after the coal was loaded because the roof just outby that pill had dropped down about 2 or 3 inches. Smith said that it was unsafe to pass under that portion of bad roof in order to bolt the roof in the fresh cut which had been loaded from the No. 7 pillar. Smith also claimed that eight breaker posts were required to be set inby the end of each pillar but in onl one entry in the entire line of pillars had breaker posts been set, and even for that single entry, only six of the eight required posts had been install Also, Smith said that an adequate amount of air was not reaching the working face because of the complete absence of brattice curtains. Smith asks that he be reinstated to his former position.

3. Monroe Mullins was the operator of the cutting machine in the pilla recovery section on the 3-to-11-p.m. shift on April 10, 1980. He had worked at the No. 1 Mine about 4 months prior to April 10. Mullins left the mine about 6 p.m. on April 10 because he believed it was unsafe to work in the mine. Mullins claimed that six breaker posts had been installed in only one entry out of seven entries, and that in the single entry where breaker posts had been set, only six had been set of the eight which were required. Mulli asked the section foreman for additional timbers, but the section foreman to him to run coal and no timbers were provided. Mullins also stated that prop ventilation was lacking because no brattice curtains at all had been install All seven pillars had been completely cut from one side to the other without leaving wings on either side of the pillars. Mullins asks that he be reinstated to his former position as operator of the roof-bolting machine.

4. Thomas V. Walker now works for the A and S Coal Company and does no

undercut. No timbers had been installed by the previous day shift, but timb
were brought in and set for him to shoot the coal down in the No. 7 pillar.
Walker had difficulty in shooting the other pillars because of their having
been drilled and undercut all the way across the pillars. The undercutting
had weakened the coal to be shot to such an extent, that the coal was settli
down to the floor of the mine and causing the holes which had been drilled f
insertion of explosives to be crushed and obliterated. Despite that problem
Walker was able to shoot coal in the No. 6 pillar; he shot only half of the
No. 5 pillar; he shot all of the No. 4 pillar and half of No. 3. The coal h
fallen so badly in the No. 1 and No. 2 pillars, that he was unable to shoot
any part of them. The hazard which upset Walker the most was that the roof
tending to override the working section and all coal fell so far into the ar
where he was working that his powder and detonators were covered by falling
coal and it was necessary for him to dig them out of the coal so that he cou
finish shooting the pillars where holes were still visible. Walker was also
concerned about being asked to set timbers beside the loading machine while
it was still in operation. Walker additionally resented the fact that the
section foreman would not stop the loading machine long enough for the miner
to determine from sound whether the roof and timbers were making noises indi
cating an imminent roof fall. Walker was also concerned about the poor
ventilation that existed as a result of the complete absence of brattice
curtains on the section.

5. H. K. Tilley was working at the No. 1 Mine on April 10, 1980. He i
unemployed at the present time and would like to be reinstated. On April 9,
Tilley had worked as an operator of a ram car, but when he went into the min
on April 10, the mine foreman told him that his job was being changed from
that of operator of a ram car to that of helper for the operator of the roof
bolting machine. He left the mine on April 10 at or about 6 p.m. because he
feared for his safety. The hazards he described were that all pillars had
been cut from one side to the other without leaving wings on each side. He
also was concerned about the complete lack of any brattice curtains on the
section. Tilley was upset about having been transferred suddenly to the
position of helper for the operator of the roof-bolting machine without
having received any prior training to do that kind of work.

6. James Thacker was an operator of a ram car on April 10, 1980. He i
now working for Preece Coal Company and does not want to be reinstated to hi
former position. Thacker left the mine on April 10 after working only a few
hours. The hazards he was upset and nervous about consisted of cracked roof
availability of only one or two timbers, and failure of ventilation. He saw
no brattice curtains at all on the section. Thacker said that failure to se
timbers prevents the miners from having a means of being warned by the crack
ing of timbers if the roof should begin to fall prematurely or suddenly.

7. Clyde Smith was working at Mullin Creek's mine on April 10, 1980.
is now working for the McGinnes Coal Company and does not want to be rein-

Two other miners helped him set those six timbers which had to be cut with dull saw. Smith realized that no timbers were available to set in other places where they were needed and requested the section foreman to get them David May, one of the men helping Smith set timbers, stated that he would s the section foreman about obtaining additional timbers. Smith was concerne about lack of ventilation which resulted from a complete absence of brattic curtains. Smith asked the section foreman to get additional pillars and th section foreman said he would worry about availability of timbers and refus to stop production until timbers could be set. Smith considered conditions in the mine to be so bad that he became upset and nervous and left the mine after working only a few hours.

8. David May is now working for Dot Coal Company. He does not want t be reinstated to his former position. May was working at Mullin Creek's No Mine on April 10, 1980, as a beltman and general laborer. He went into the mine about 3 p.m. and saw several unsafe conditions, including cracked roof pillars being cut all the way across the ends, and poor ventilation because of the complete lack of brattice curtains. May asked the section foreman f additional timbers and the section foreman promised to have some brought in the mine. May waited at the power center for the timbers to be brought in, but they did not arrive before the mine foreman came into the mine and cal all men together for a talk which was highly critical of their working habi May became upset after the foreman's speech and left the mine a short time afterward, believing that conditions in the mine were too unsafe for him to continue working there.

9. John R. Telfer, Jr., now works for Wolf Creek Collieries and does want to be reinstated to his former position at Mullin Creek's mine. Telfe was working on the 3-to-11-p.m. shift on April 10, 1980. He had been a hel for the operator of the roof-bolting machine, but when he entered the mine work on April 10, he was given the job of being an operator of a ram car. believed conditions to be unsafe in the mine because the pillars had been c all the way across the ends and there was a complete lack of brattice curta There were not enough timbers on the section and Telfer asked the section foreman to get some timbers, but the section foreman declined to stop produ tion to install timbers and told Telfer to haul coal. Telfer left about 6 after deciding that conditions were too hazardous for him to continue worki on the section.

10. James R. Clevenger was working at Mullin Creek's mine on April 10 1980, as a repairman. He is presently unemployed and would like to be rein stated to his former position. He left the mine on April 10 about 6 p.m. after deciding that conditions were too hazardous for him to continue work- ing. The conditions he described were that the pillars had been cut all th way across, that complete lack of any brattice curtains failed to provide proper ventilation, and that no roadway timbers had been set. He repaired cutting machine and a tractor for a ram car before he stopped working on April 10, 1980.

foreman saw them on the surface of the mine and stated, as they passed the mine office, that he would interpret their leaving before the shift had expired as a voluntary resignation or act of quitting. All of the complainants stated that they disagreed with the mine foreman's position and some of them told the mine foreman that they were not quitting and would report to work the next day.

12. When complainants returned to work on Friday, April 11, 1980, the day after they had declined to work in unsafe conditions, they first went by the office to pick up their paychecks. The checks were accompanied by "quit" slips which the men refused to accept. According to the testimony of respondent's bookkeeper and one of the former owners of the mine, Kenneth Stanley, the quit slips were supplemented on Monday, April 14, 1980, with lay-off slips. The lay-off slips allowed the complainants to draw unemployment compensation after April 10, 1980, whereas the "quit" slips would not permit them to claim unemployment compensation.

13. Stanley was at the mine office when complainants picked up their checks on April 11, 1980, and he talked to them individually, or in a group, in his office. He asked them to call him after he had investigated their complaints. They did call back on Monday, April 14, 1980, and Stanley, or his secretary, told them that they no longer had jobs at Mullin Creek's mine.

14. All of the complainants testified that they received certified letters asking them to come back to work on May 1, 1980. All of them returned to work after receiving the certified letters. None of the nine complainants were reinstated to their former positions on a production shift. Instead, they were assigned work related to laying track in the mine for the purpose of opening a new section which would use a continuous-mining machine. On May 9, 1980, after they had worked less than 2 weeks, all of the complainants received lay-off slips. According to the testimony of Earl Tolman and Debbie Stanley, who worked in respondent's office, on May 9, 1980, the same day that complainants were laid off, a total of 23 miners, including complainants, were laid off. On May 30, 1980, 11 additional miners were laid off; on June 3, 1980, 10 miners were laid off; and on June 6, 1980, 3 miners were laid off.

15. Two MSHA inspectors, named Hugh V. Smith and Danny Harmon, conducted a spot inspection of respondent's No. 1 Mine on April 11, 1980, the day after the complainants had left the mine in protest of unsafe conditions. Inspector Smith wrote Citation No. 713379 at 4:15 p.m., under section 104(d)(1) of the Act, alleging that a violation of 30 C.F.R. § 75.200 had occurred in the area of the mine where retreat mining was in progress. The citation states that respondent's roof-control plan had been violated by the failure of respondent to install roadway posts in the Nos. 1, 2, and 3 pillar blocks and by the failure to use wooden cap blocks on the radius turn posts that had been installed in the Nos. 1-6 pillar blocks. The citation also alleges that the pillar blocks appeared to be taking weight because coal was sloughing from

9,000 cubic feet per minute of air was not reaching the last open crosscut carry away any harmful dust and explosive gases which might have accumulate in the mine. The order stated that there was insufficient air movement to turn the blades of an anemometer. Inspector Harmon stated that no brattice curtains at all had been installed on the section and that 10 brattice curtains had to be erected to direct an adequate volume of air to the last ope crosscut on the working section.

16. Kenneth Stanley was a co-owner of the No. 1 Mine on April 10, 198 when complainants left the mine after objecting to the hazardous conditions which existed in the mine. Stanley sold his stock in June 1980 and, at the time of the hearing held in March 1981, Stanley had no interest in Mullin Creek Coal Company. On April 11, 1980, when complainants reported to the mine office to pick up their checks, Stanley asked the miners to come into his office to discuss the reason for their leaving the mine on April 10. H talked to three or four of them individually and then all of them came into his office at once. Stanley stated that the reason they gave for walking out was that they were upset and nervous about the way the mine foreman had talked to them on April 10. As indicated in Finding No. 13 above, Stanley investigated their complaints and then advised all of them that they no lon had jobs at Mullin Creek's mine.

17. Both Stanley and respondent's bookkeeper testified that the miner came to the mine dressed in casual clothes and that none of them wore hard-hats or other clothing required for working underground. Both Stanley and the bookkeeper saw the miners when they came for their checks around 11 a.m or noon and did not know whether the miners had brought their working cloth with them for use around 3 p.m. when the second shift on which they worked began.

18. Stanley stated that the mine foreman on the second shift, Elbert Church, had reported to him that the complainants had left the mine before their shift had ended, but Stanley could not recall whether Church had give him a reason for complainants' leaving. Stanley stated that instructions h been placed on the bulletin board and that all miners had been told that th should report any unsafe conditions first to the section foreman, then to t mine foreman, then to him, and that if the unsafe conditions were not elimi nated by any of the management personnel at the mine, the unsafe conditions should be reported to both the State and Federal inspectors.

19. Freddie Meade is a ram car operator who was hauling coal on the second shift (3-to-11-p.m.) when the complainants left the mine. He said t one of the complainants, Clyde Smith, tried to get him to leave at the time the nine complainants left, but he declined to leave. Meade said that the miners on the day shift were not setting timbers on their shift and that th men on the second shift resented having to install timbers which should hav been set by the miners who worked on the day shift. Meade stated that the

working face if they were needed. Meade testified that there were plenty brattice curtains in the mine, but he did not like to see curtains hung n the face because, in his opinion, they are a hazard to the loading of coa because they obstruct vision. Meade agreed that conditions on the sectio were unsafe on April 11 when the inspectors examined the mine.

20. Bobby Smith was the operator of the loading machine on April 10 1980, when the nine complainants left the mine before their second shift ended. He agreed with the nine complainants that conditions in the mine bad on April 10 because the pillars had been cut all the way across, no brattice curtains had been installed, and no roadway posts had been erect Bobby Smith, however, said that no one complained about not having timber He also said that the reason the men left the mine on April 10 was that t were upset because the mine foreman, Elbert Church, had changed some of t positions around, such as Clyde Smith's reassignment to setting timbers a H. K. Tilley's reassignment as helper for the operator of the roof-boltin machine. Bobby Smith said that the complainants were also upset because were having to set timbers on their shift which should have been set on t day shift. Bobby stated that in Church's speech to the men on the second shift on April 10, Elbert Church, the mine foreman, emphasized the fact t he could not do anything about the way the day shift did its work, but th he was responsible for the way they (the miners on the 3-11 p.m. shift) d their work. Church also made it clear to the miners on the second shift they would have to increase production on their shift because the second shift's production had declined considerably.

21. Bobby Smith also emphasized the fact that the miners on the sec shift were deliberately doing acts which interfered with production. He mentioned such acts as deliberately stalling a ram car in a mud hole, thr a metal guard on the belt to stall it, and dumping coal on the feeder whe the beltline was already stalled. Smith claimed to have personal knowled only as to the stalling of the ram car.

22. Lawrence Kindrick is a certified mine foreman and is now workin Moore and Moore Coal Company, but on April 10 he was employed by respondei was operating a coal drill on the 3-to-11 p.m. shift. He testified that mine foreman, Elbert Church, made a speech to the miners toward the first of the shift. The miners were upset about the things Church said and lef mine, but Kindrick did not know when they left. He stated that he saw no unsafe that night. Although he first stated that he did not recall how t section looked, he thereafter stated that the section was being ventilate that timbers had been set in each entry, and that there were plenty of ti available on the section.

23. Elbert Church was the mine foreman on the 3-to-11 p.m. shift on April 10, 1980, when the complainants in this proceeding left the mine be their shift was over. He has worked for respondent for the past 4 years.

they were idle an excessive amount of the time and that if he found them loafing when the section foreman had assigned them work to do, they would be discharged on the spot. Church said that the miners on his shift had been complaining because they had to set the timbers which the day shift should have installed. He said that he told them the day shift was the day-shift foreman's responsibility and that he would let the day-shift foreman worry about that shift and that he would worry about his shift.

24. In Church's opinion, the complainants had left on April 10 because, in his speech to them, he had threatened to fire them if they continued to loaf when they should be working. Church agreed with the testimony of one of the complainants, Clyde Smith, to the effect that Church had refused to grant Smith's request for permission to talk to Church after Church had completed making his speech on April 10. Church said the reason that he refused to talk to Smith was that Smith had, on a previous occasion, talked to Church for 45 minutes during a production shift. For that reason, Church believed that anything Smith might have to say to him could be postponed to the end of the shift. Church stated that he would not ask miners to work in unsafe conditions and claimed that he had had brattice curtains installed to within two crosscuts of the working face. Church testified that he was on the surface of the mine when complainants left early on April 10 and that he warned them at the time they left that he would consider their leaving to be the same as if they had been discharged.

Violations of Section 105(c)(1) of the Act Were Proven To Have Occurred

I believe that the 24 Findings of Fact set forth above summarize the bas facts on which my decision should be based. The ultimate question raised by the Complaint in this proceeding is whether violations of section 105(c)(1) occurred. Section 105(c)(1) provides, in pertinent part, that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal mine subject to this Act because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * at the coal * * * mine of an alleged danger or safety or health violation in a coal * * * mine, * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

The section foreman, Joe Beard, to whom complainants reported safety and health violations, did not testify as a witness to this proceeding. Several of the complainants testified that they had complained to him about a lack o

Respondent's witnesses did not purport to claim that they were in the prese of the section foreman at all times on April 10 so as to be able to state t no safety complaints were made to the section foreman.

Complainants' testimony to the effect that they complained about safet clearly preponderates, especially in the absence of any testimony by the se tion foreman giving his version of the events which occurred on April 10. The Commission held in Local Union No. 1110, UMWA v. Consolidation Coal Co. 2 FMSHRC 2812 (1980), that it is unrealistic to require that each of a grou of miners make his own individual complaint about safety if he knows that other miners have already complained without receiving any improvement in conditions.

There can be no doubt about the existence of unsafe conditions in the mine on the 3-to-11 p.m. shift on April 10, 1980. Even respondent's witnesses, with the exception of Lawrence Kindrick, testified that conditions in the mine were unsafe on April 10, 1980. Kindrick's testimony is entitle to almost no weight because he first testified that he did not recall what conditions existed on April 10 and thereafter stated that timbers had been set and that ventilation curtains had been installed.

The mine foreman stated that brattice curtains had been installed to within two crosscuts of the working face. Even if that were true, curtains installed within two crosscuts of the working face will not provide the volu of 9,000 cubic feet per minute of air at the last open crosscut which is required by 30 C.F.R. § 75.301. Therefore, the mine foreman's testimony do not controvert the complainants' contention that proper ventilation was not being provided on April 10. Moreover, the mine foreman stated that he reje the complainants' objections to having to install timbers which should have been set by the day shift on the ground that he was not responsible for the failure of the day shift to comply with respondent's roof-control plan. Th mine foreman completely ignored the fact that the day shift's failure to install timbers caused the miners on his shift to be exposed to unsafe roof conditions until the miners on his shift could install the timbers which ha not been erected by the day shift. The mine foreman's excuse that the day shift's foreman could worry about the day shift and that he would worry abo the night shift was a clear failure on his part to carry out his responsibi to see that the working section was safe. Obviously, one of the reasons th his second shift's production had declined was that his men were having to the roof-support work which should have been performed by the crew of men w worked on the day shift. It is not surprising that his men became upset when he threatened to fire them for loafing and refused to listen to their complaints.

tion that they refused to work on April 10 because of the unsafe condit in the mine, is that all of the miners who refused to work gave as thei son for refusing to work that they they were upset and nervous. Nearly complainants testified that they were nervous and upset when they refus work on April 10. That would be a normal reaction for men to have who exposed to unsafe roof conditions each day when they reported to work. would also be a normal reaction for men to have when their foreman blam them for failure to produce large quantities of coal while simultaneous expecting them to do the roof-control work which should have been perfo by the miners on the day shift.

Every one of the unsafe and unhealthful conditions cited by the co ants who refused to work was corroborated by the testimony of responden own witnesses. The mine foreman conceded that one of the complainants been sent to obtain a supply of timbers and therefore was not present a time he made his speech threatening to fire the men if they did not inc their production of coal. The fact that a man had been sent to obtain supports the complainants' contention that an adequate supply of timber unavailable on the section at the time they were told to set timbers.

The complainants' contention that timbers were not being set by th shift is also supported by the fact that when Inspector Smith examined mine on April 11, the day after the men refused to work because of unsa roof conditions, he cited respondent for an unwarrantable failure viola of its roof-control plan in that roadway posts had not been set in the 1, 2 and 3 pillar blocks, that cap blocks were not being used on the ra turn posts that had been installed in the Nos. 1 to 6 pillar blocks. A tionally, the inspector noted that two of the pillar blocks had been da off by respondent as being unsafe for extraction operations. The dange had been erected on the next shift following the one on which the compl had refused to work. The inspector's finding of unsafe roof conditions April 11 is strong corroboration for the complainants' contention that roof was unsafe at the time they refused to work.

As to the complainants' contention that an inadequate amount of ai being provided at the working face, Inspector Harmon wrote an order of drawal under the unwarrantable failure provisions of the Act on the nex after the men refused to work. The reason given for his writing the or was that his anemometer would not even turn when he tried to determine whether the required volume of 9,000 cubic feet of air per minute was b provided at the last open crosscut. Inspector Harmon testified that no brattice curtains whatsoever had been installed in the working section that it was necessary for the miners to erect 10 brattice curtains befo an adequate volume of air could be directed to the working face. The inspector's finding on April 11 as to a complete lack of brattice curta is strong corroboration for the complainants' contention that the secti was not being ventilated properly on April 10 when they refused to work

tains on the morning of April 11 if they had actually existed on the evening of April 10. Even assuming that the mine foreman's testimony is correct, th lack of curtains for a distance of two crosscuts from the place where complainants were working would have failed to provide adequate ventilation at the working face.

It is true that Stanley, one of respondent's co-owners, claims to have interviewed the men on April 11 after they had walked out on April 10. He claims that the men defended their refusal to work only on the grounds that they were nervous and upset and that they did not complain about unsafe or hazardous conditions on April 11. Stanley promised to investigate the cause of their being upset and nervous, but the only investigation he made was to ask the mine foreman what had happened. Stanley did not go underground on either April 10 or April 11 to examine the working section. He had told the complainants to call him on Monday after he had finished his investigation. When the complainants did call, Stanley told them that he no longer had a job for them.

The conditions described by the complainants on April 10 and the conditions described by the inspectors on April 11 would be expected to cause miners to be upset and nervous. The fact that complainants may not have articulated the reason for their being upset and nervous at the time they refused to work is not a sufficient reason to dismiss the Complaint when the evidence shows that working conditions in the mine were both unsafe and unhealthful at the time they refused to work. Several of the complainants testified that they were too nervous to eat their lunch and one man was so upset that he vomited.

It should be noted that the mine foreman did not try to determine the cause of their refusal to work. The only action he took when he saw the complainants leaving on April 10 was to tell them as they walked past his office that he would consider them to have been discharged if they walked out before the shift had been completed.

The Alleged Sabotage

Respondent claims that the miners were committing acts of sabotage in the mine. The mine foreman testified that the miners were throwing objects into the feeder and on the conveyor belt for the purpose of causing it to become so choked with foreign materials that the equipment had to be stopped while the clogging materials were extricated. The operator of the loading machine claimed that he saw one of the complainants deliberately drive a ram car in a mud hole for the purpose of rendering it inoperative.

One of the complainants, James Clevenger, testified that he repaired a wire in the control panel on the ram car. No one tried to controvert Clevenger's claim that he repaired a wire in the ram car. Therefore, the

Respondent does not take the position that it discharged complainants because of the alleged acts of sabotage described above. Since Respondent does not claim that it discharged complainants because of the alleged acts of sabotage, it is unclear to me just how respondent would have me use its claim that complainants were deliberately trying to slow down production.

Respondent's Claim that Complainants Refused To Work Because of Peer Pressure

Respondent claims that complainants refused to work on April 10 because several of the miners' jobs had been changed. The mine foreman changed H. K. Tilley's job from that of an operator of a ram car to that of a helper to the operator of the roof-bolting machine and the mine foreman changed Clyde Smith' job from operator of the coal drill to that of setting timbers. Two of the men (Freddie Meade and Bobby Smith) who remained in the mine and continued working on April 10 testified that two of the complainants, Tilley and Smith, respectively, tried to get them to leave the mine because Tilley and Smith were upset over the changes in their jobs.

Each of the complainants testified that he had refused to work on April because of unsafe and unhealthful conditions in the mine. If the evidence dis cussed above and the findings of fact set forth above had failed to show that unsafe and unhealthful conditions existed in the mine on April 10, respondent' claim that the men were persuaded to leave by Tilley and Smith who were dissatisfied with their job assignments would be more persuasive than it is. Clyde Smith testified that the change in his job from operator of the coal drill to that of setting timbers did not upset him because the change provide him with an opportunity of making the mine safe by giving him time to set the timbers which were required by the roof-control plan. Smith claimed, however, that only six timbers were available on the section at the time he started to set timbers on April 10. After he and two other miners had set the six timbers available, he asked the section foreman to obtain a supply of additional timbers. The mine foreman testified that David May had been dispatche to obtain timbers. The evidence, therefore, supports Smith's claim that he could not set timbers because none were available after he had installed the six which were present on the section when he reported for work.

The fact that all nine complainants left at the same time indicates that they probably had a discussion among themselves about leaving before they actually left the section. There is a lack of evidence, however, to show that the primary reason the miners left was that four of them had had changes in their job assignments. Assuming that Smith was upset over the change in his job assignment, the evidence shows that he had additional reasons for refusing to work and for trying to influence some of the other miners to refuse to work. He testified that when he asked the section foreman for additional timbers, the section foreman told him that he could not stop

be called to examine conditions on the section. Smith also said that the mine foreman refused to listen to his complaints after the mine foreman had made his speech exhorting the men to increase production. The mine foreman himself corroborated that David May had been sent to obtain a supply of timbers. Consequently, Smith had quite a few reasons to be upset about conditions in the mine on April 10 and it is quite likely that he included his job reassignment as one of the reasons for suggesting that all of the men ought to refuse to work in protest of the conditions which existed. Both of respondent's witnesses who claimed that Tilley and Smith had tried to get them to leave the section also testified that conditions on the section were unsafe on April 10 when the nine complainants refused to work and left the section.

In view of the circumstances described above, I cannot conclude that th Complaint in this proceeding should be dismissed just because one or two of the complainants may have been active in persuading the other seven complainants to refuse to work in protest of the unsafe conditions under which they were asked to perform, especially in light of the mine foreman's request that they increase production at the same time that he declined to take action to provide proper roof support and ventilation.

The Recall of Complainants on May 1, 1980

One of the few facts in this proceeding which was undisputed is the fac that all nine of the complainants were sent certified letters asking that th report for work on May 1, 1980. All of them did report for work in response to the certified letters. None of them, however, were reinstated to the pos tions on a production section which they held prior to their discharge on April 10. Both Stanley, the co-owner who testified at the hearing, and the company's bookkeeper stated that the nine complainants were recalled for the sole purpose of doing manual labor, such as laying railroad track, required for opening a new section which would utilize a continuous-mining machine in lieu of the conventional equipment which was being used in the section of th mine where complainants were working on April 10. Stanley stated that he knew when he recalled the nine complainants that they would be used in connection with opening the new section and that they would be laid off when that limited work had been completed. As it turned out, the nine complainants did various types of manual labor at the mine and were then laid off on May 9 after working less than 2 weeks.

The evidence shows that on May 9, when complainants were laid off, 14 other miners were laid off. Additional miners were laid off on other dat 11 on May 30, 10 on June 3, and 3 on June 6. The reason for the general red tion in personnel was that the mine was converted to use of continuous-minin machines which require fewer miners than operation of a mine using conventio equipment. Respondent contends that even if violations of section 105(c)(1) are found to have occurred so as to warrant the reinstatement of some of the miners, and payment of lost wages to all of them, that the only period for

which happened on April 10, 1980.

I find that respondent's position as to back pay must be rejected for several reasons. There was not a true reinstatement of complainants to the positions which they held at the time of their discharge. The co-owner who testified at the hearing stated unequivocally that when complainants were recalled on May 1, respondent's management knew that complainants would be employed only for a very brief period of time for the purpose of laying trac to open the new section. Respondent's witnesses did not explain how the reduction in force was made. All of complainants were discharged on May 9, the day when the first group of miners were laid off. There is nothing in the record to show that all nine complainants would have been laid off on May 9 if they had not refused to work on April 10. The fact that complainants were recalled for a short-term job and then laid off again 9 days later as a general reduction in force supports a conclusion that the rehiring and second discharge were part of a plan deliberately designed to prevent the miners from recovering back pay in the event their Complaint in this proceeding should be granted.

The Miners' Right To Withdraw Because of Unsafe Conditions

The findings of fact set forth at the beginning of this decision show that complainants had been exposed to unsafe conditions on April 10, 1980. The Commission held in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980 that a miner has the right under the Act to refuse to work in hazardous cond tions. The evidence shows that complainants had objected to the lack of roo support and ventilation on April 10, 1980, prior to the time that they refus to work. Therefore, respondent violated section 105(c)(1) of the Act with respect to each of the nine complainants when respondent refused to allow complainants to return to work on April 11 because of their refusal to work in unsafe and unhealthful conditions on the afternoon and evening of April 1 1980. The order accompanying this decision will hereinafter require respondent to reinstate to their former or equivalent positions all of the complai ants who wish to be reinstated. Respondent will also be ordered to pay all complainants the wages which they would have earned if they had not been unlawfully discharged on April 10, 1980.

It was agreed at the hearing that evidence would not be taken with resp to the jobs which some of the complainants have held between the time they were discharged on April 10, 1980, and the time that they are paid back wage under the order accompanying this decision. At the conclusion of the hearin on the merits, I stated that I would provide a period of time for complainan to calculate their back pay and that a supplemental hearing would thereafter be scheduled at which respondent would be given the opportunity to challenge any of the facts underlying the calculations of back wages. No final decisi

1 Penalty

Counsel for complainants requested at the conclusion of the hearing that sess civil penalties for the violations of section 105(c)(1) which I have d to exist. My order issued January 13, 1981, providing for hearing in proceeding, consolidated the civil penalty issues with the issues raised he filing of the Complaint, but that order made it clear that I would defer assessment of civil penalties until such time as the Secretary of Labor s a Proposal for Assessment of Civil Penalty pursuant to the provisions ections 105(a) and 110(a) of the Act and sections 2700.25, 2700.26, and .27 of the Commission's Rules of Procedure (29 C.F.R. §§ 2700.25, 2700.26, 2700.27).

WHEREFORE, it is ordered:

(A) The Complaint of Discharge, Discrimination, or Interference filed his proceeding on October 24, 1980, is granted for the reasons herein- re given.

(B) Respondent shall reinstate Jerry Lee Smith, Monroe Mullins, H. K. ey, and James R. Clevenger to their former or equivalent positions at ondent's No. 1 Mine.

(C) Respondent shall pay all nine complainants the wages they would have ed if they had not been unlawfully discharged on April 10, 1980. Back may be reduced by the amount which any of the complainants earned from ing at other jobs between the date of their discharge on April 10 and the of their reinstatement with respect to the four miners named in paragraph above or to the time of repayment of back pay with respect to the remain- five complainants who do not wish to be reinstated.

(D) Respondent shall provide MSHA's investigators and complainants such information as they may need from respondent's payroll records in uting the back pay.

(E) Complainants' counsel is responsible for assuring that the basic s required for computing back pay and offets thereto are gathered, com- d, and computed. The time for accomplishing the gathering of said rmation and making the necessary calculations will expire on May 22, , unless an extension of time is required and requested.

(F) The employment records of all nine complainants shall be completely nged of all references to their unlawful discharge and matters relating eto.

(G) Counsel for complainants and counsel for respondent shall confer agree upon a mutually convenient time for recovening of the hearing for

time they were discharged on April 10, 1980, and the time the hearing
reconvened. The date agreed upon shall be reported to me and an order
viding for reconvening of the hearing will be subsequently issued subje
openings in my calender of hearings and the availability of a suitable
ing room. If the date requested by counsel conflicts with my calender
the availability of a hearing room, a change in the date will not be ma
without giving counsel for both parties an opportunity to arrive at an
alternative date.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Darryl A. Stewart, Attorney, Office of the Solicitor, U.S. Departm
Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37
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Charles E. Lowe, Esq., Attorney for Mullin Creek Coal Company, In
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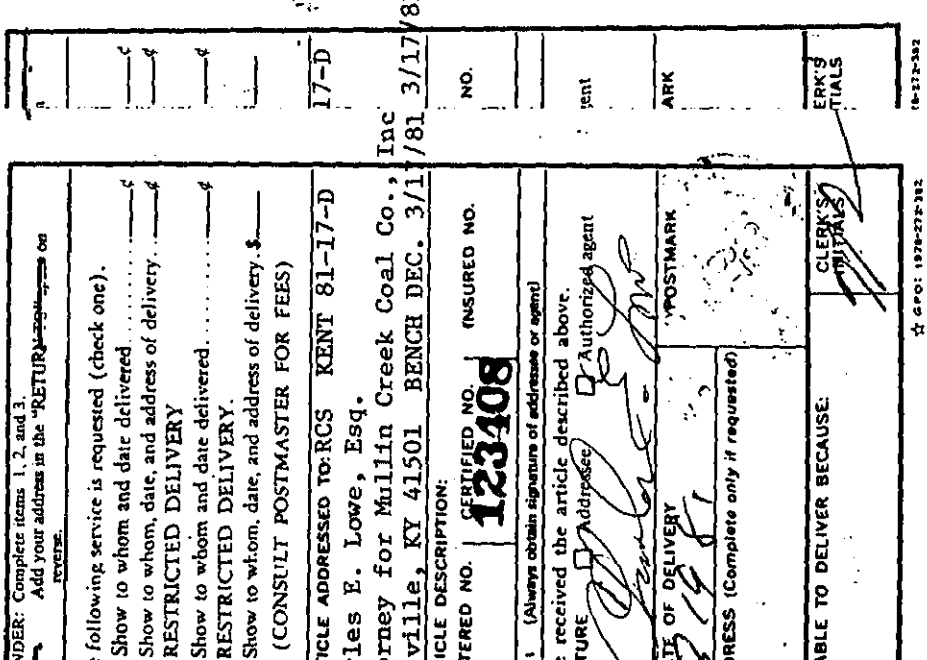

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 18, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLYDE JR. SMITH, JAMES R. CLEVENGER, MONROE MULLINS, DAVID MAY, JERRY LEE SMITH, JOHN R. TELFER, JR., JAMES THACKER, H. K. TILLEY, JR., AND THOMAS V. WALKER, Complainants	:	Complaint of Discharge, Discrimination, or Interference Docket No. KENT 81-17-D No. 1 Mine
v.	:	
MULLIN CREEK COAL COMPANY, INC., Respondent	:	

ORDER GRANTING REQUEST FOR EXTENSION OF TIME

Counsel for complainants filed on May 15, 1981, in the above-entitled proceeding a letter requesting that the time for compiling back-pay data for complainants in this proceeding be extended from the date of May 22, 1981, to July 6, 1981. As grounds for granting the motion, complainants' counsel states that the special investigator who was working on the case has been attending a training program in Beckley, West Virginia, for seven weeks and has been unable to devote any time toward the compilation of the back wages involved.

In the order accompanying the bench decision mailed to the parties on March 17, 1981, I provided in paragraph (E) that the time for compiling the data required for computing the back pay due complainants under my bench decision would expire on May 22, 1981, unless an extension of time was found to be required. Under the Commission's rules, 29 C.F.R. §§ 2700.8(b) and 2700.10(b), respondent has a period of 15 days within which to file an answer to complainants' motion for an extension of time. Inasmuch as the date of May 22 will come before the 15-day period for filing a reply has expired, I shall act upon the motion at this time. If respondent's counsel files an answer in opposition to the granting of the extension of time, I shall modify this order, if necessary, to consider any objections which may be raised by respondent in opposition to the grant of the request for extension of time.

It was obvious at the hearing that complainants have not kept precise records as to the dates of their employment or the amounts paid. I would assume that the investigator will have to check with the employers of those

time required for obtaining the necessary back pay data.

The official file now contains the filings by respondent's counsel seeking to obtain review of my bench decision. The provision in the ord accompanying my bench decision for reconvening of the hearing was grante response to the request for a further hearing made by respondent's couns I should make it clear at this time that if respondent's counsel is able agree with complainants' counsel as to the amount of back pay due to eac of the complainants, I am willing to accept such a stipulation. A stipu tion would avoid the necessity of holding a further hearing. If the amo of back pay could be provided to me without the need for holding a furth hearing, I would be willing to insert the back-pay amounts for each comp ant in my bench decision and issue it in final form within a very short after I have received the necessary information from the parties.

If the procedure set forth in the preceding paragraph could be foll respondent could file its petition for discretionary review immediately receipt of my final decision. I am suggesting the above-described proce for the parties' consideration. If a further hearing is desired by the I shall be glad to hold it at a date which is agreeable with the parties long as such date does not conflict with my own calendar of hearings or availability of a hearing room.

WHEREFORE, for the reasons given above, it is ordered:

The request for an extension of time to and including July 6, 1981, within which to compile the back-pay data required by paragraph (E) of t order accompanying my bench decision is granted and the time is extended to July 6, 1981.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 12 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLYDE SMITH, JR., JAMES R. CLEVENGER, MONROE MULLINS, DAVID MAY, JERRY LEE SMITH, JOHN R. TELFER, JR., JAMES THACKER, H. K. TILLEY, JR., AND THOMAS V. WALKER, Complainants	:	Complaint of Discharge, Discrimination, or Interferenc
	:	Docket No. KENT 81-17-D
	:	No. 1 Mine
v.	:	
MULLIN CREEK COAL COMPANY, INC., Respondent	:	

ORDER PROVIDING FOR COMPUTATION OF BACK PAY

Preliminary Considerations

1. The Effect To Be Given to Delay in Providing Data

A hearing was held in the above-entitled proceeding on March 6 and 7, 1981. On March 17, 1981, I mailed to the parties a bench decision finding that respondent had violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and ordering respondent to reinstate four of the nine complainants and reimburse the remaining five complainants for back pay which they would have earned if they had not been unlawfully discharged. Paragraph (E) of the bench decision provided that counsel for complainants was responsible for gathering the required information and computing the amount of back pay due to each of the nine complainants. Paragraph (E) also provided that the time for computing back pay would expire on May 22, 1981, unless an extension of time was requested.

Counsel for complainants filed on May 15, 1981, a request for an extension of time to and including July 6, 1981, within which to compile the necessary information and compute the amount of back pay due to complainants. The sole reason given for the requested extension of time was as follows:

increased by the grant of the extension. Therefore, in my order of May 18 1981, I made the following observation:

> * * * Under the Commission's rules, 29 C.F.R. §§ 2700.8(b) and 2700.10(b), respondent has a period of 15 days within which to file an answer to complainants' motion for an extension of time. Inasmuch as the date of May 22 will come before the 15-day period for filing a reply has expired, I shall act upon the motion at this time. If respondent's counsel files an answer in opposition to the granting of the extension of time, I shall modify this order, if necessary, to consider any objections which may be raised by respondent in opposition to the grant of the request for extension of time.

Respondent's counsel never did file any objection to the grant of the exte sion of time.

Paragraph (G) of my bench decision provided, among other things, as follows:

> (G) Counsel for complainants and counsel for respondent shall confer and agree upon a mutually convenient time for re-convening of the hearing for the purpose of permitting respondent's counsel to develop any facts which may be required pertaining to places where complainants have worked between the time they were discharged on April 10, 1980, and the time the hearing is reconvened. * * *

The order extending the time for compiling and computing back pay also stated that if the parties could agree on the facts pertaining to computation of back pay, no supplemental hearing would be required. Counsel for complainants filed a letter on July 21, 1981, stating, in its entirety as follows:

> In accordance with your request, be advised that the above respondent's attorney and myself have agreed that the latter part of October, 1981 or anytime in November, 1981 would be an agreeable time to conduct the further hearing in the above proceeding.
>
> The above suggested hearing period was agreed upon in light of respondent's request to obtain copies of complainants' 1980 Federal Income Tax Return and W-2 Forms for 1980 which are not presently in respondent's possession.
>
> Although I presently possess some of the documents respondent has requested, the reamining copies must be obtained from the

take up to 10 weeks.

Accordingly, if the above suggested hearing period is unacceptable, please so inform us so that the parties can undertake to make other arrangements.

In a notice of reconvening of hearing issued August 10, 1981, I stated that I had already scheduled hearings to be held in October and during the first week of November. Therefore, I scheduled the hearing in this proceeding to be reconvened on November 17, 1981.

Up to the time the hearing was reconvened on November 17, 1981, respondent's counsel had voiced no objections to the length of time which had passed between the issuance of my bench decision on March 17, 1981, and the reconvening of the hearing on November 17, 1981. Shortly after the hearing had begun on November 17, however, counsel for respondent stated that he had complied with the orders in my bench decision by furnishing complainants' counsel with the rates of pay which the complainants had been earning at the time of their discharge, but that complainants' counsel had still not provided respondent with the dates and places where the complainants had worked and that he did not think respondent should have to pay for the delay which had resulted from the failure of complainants' counsel to provide the necessary information (Tr. 967-968).

Counsel for complainants stated that he had tried to obtain the necessary information, but had been unable to do so because the complainants had failed to respond to the letters he had sent to them requesting information. Counsel for complainants concluded his explanation for the length of time which had been spent in trying to get information as follows (Tr. 971-972):

> * * * I've indicated that this portion of the proceeding is an individual effort; it's not a group effort. They can't rely on information provided by one miner to support their claim for back wages; they have to bring it forward themselves. I've even sent them forms that requested for the IRS where all they had to do was fill out the information and mail it in and IRS would send it back to them. I haven't gotten that from several of the men. Now, Your Honor, I'd like to say for the record I can't come down here and sit with them every day. I can't travel with them to where they're going. I have to put some responsibility on these men and I just haven't got it for each one of them.

I ruled at the hearing that each of the nine complainants would testify and that his back pay would be allowed, based on whether he had cooperated in providing information in a prompt manner (Tr. 973-974).

plainants' counsel for several months prior to November 17 when the heari was reconvened.

It is clear that the failure of some miners to provide information caused an inordinate delay between the rendering of the decision on the merits and the calculation of back pay. A large part of the delay resulted simply from the fact that nine complainants are involved. They live in various parts of the country. Complainant Walker, for example, had to drive 400 miles one way just to testify at the hearing (Tr. 974). They have a wide range of ability and understanding of what was required of them.

Respondent's counsel requested that my rulings with respect to back take into consideration the complainants' inordinate delay in providing t information required for computation of back pay. I would like to grant respondent's request and place a cut-off date beyond which respondent wou not be liable for payment of back pay, but there are various equities to consider. The most unjustified delay occurred immediately after the issuance of my bench decision on March 17, 1981. As indicated above, my bench decision provided that all data be compiled and that back-pay compu tations be supplied to me by May 22, 1981. Yet nothing whatsoever was do during that 2-month period. Counsel for complainant explained that the 2-month delay had occurred because of a "communications breakdown" and th attendance by MSHA's special investigator at a training program conducted in Beckley, West Virginia. Respondent's counsel can hardly be held respo sible for that 2-month delay, but neither can the nine complainants be he responsible because they were not asked to supply any information at all during that 2-month period. I would like to hold that respondent is not liable for payment of back pay during that period, but, if I were to do s I would be penalizing the complainants for possible shortcomings of their counsel and MSHA's special investigator during that period.

Respondent's counsel did not specifically object to the initial 2-month delay. His objection as to the delay was directed to the period of time after June 10, 1981, when he supplied to complainants' counsel the rates of pay which complainants were earning prior to their discharge. Counsel for respondent also objected to the failure of complainants' coun to provide him with income tax returns and other data when complainants' counsel sent respondent's counsel a letter dated October 28, 1981 (Tr. 96 972). Complainants' counsel explained that he had obtained income tax returns and other data from some of the complainants and that he thought they had been sent to respondent's counsel, but that his secretary inadvertently failed to enclose them with the letter of October 28 (Tr. 969).

neither counsel apparently ever undertook to discuss each complainant's back pay on an individual basis so as to make an attempt to reach a specific figure with respect to each complainant.

The legislative history pertaining to section 105(c) of the Act makes it clear that Congress wanted the miners to be reimbursed for all costs incurred by the miners as a result of any act of discrimination. Page 37 of Senate Report No. 95-181, 95th Cong., 1st Sess., May 16, 1977, states as follows:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

In view of the legislative history quoted above, I believe that the ruling I made at the hearing is the only one which can be made with respect to reducing respondent's exposure to payment of back pay, that is, that the complainants are entitled to receive back pay for any period after their discharge when they did not have jobs paying at least as much as they would have received had they not been discharged, the only exceptions being in those instances when complainants caused undue delay by failing to respond to requests for information made by their counsel and MSHA's special investigator (Tr. 972).

2. The Effect To Be Given to Complainants' Decline of Reinstatement

Counsel for respondent also pointed out at the hearing (Tr. 1167) held on November 17, 1981, that five complainants had testified during the initial hearing held on March 6, 1981, that they did not want to be reinstated at respondent's mine. Respondent's counsel argued that respondent should not have to make payments of back wages to any complainant who declined reinstatement on March 6, 1981. As to that argument, it is clear that my bench decision contemplated that the miners declining reinstatement would be entitled to back pay up to the time that checks for back pay were actually written. Paragraph (C) of my bench decision ordered respondent to provide back-pay for the miners who declined reinstatement for the period running from their first discharge on April 10, 1980, to "* * * the time of repayment of back pay". The bench decision was issued on March 17, 1981. If I had had the necessary data regarding back pay, I could have issued a final decision on March 17, 1981, and that decision would have

981, because all those complainants who declined the actual offer of back ay have no right to be paid for any period beyond the date when they ither accepted the offer and commenced working again for respondent, or eclined the opportunity to be placed on respondent's payroll again. nterest on the payment of back pay will, of course, continue to run until ne day the payments are actually made.

. Stipulation for Period Between First Discharge and Second Discharge

Finding Nos. 11 through 14 in my bench decision explain that all nine omplainants in this proceeding were first discharged on April 10, 1980, nen they refused to work because of unsafe conditions. All nine complain- nts were given an opportunity to return to work at respondent's mine on or bout May 1, 1980. All nine of the complainants returned to respondent's ine and worked until they were discharged again on May 10, 1980. Conse- uently, complainants are entitled to back pay for the 14-day period from pril 10, 1980, to May 1, 1980. One complainant did not return until after ay 1 and is entitled to pay for about 16 days. Counsel for the parties ubmitted as Exhibit 4 in this proceeding a stipulation providing for the xact amount of back pay each complainant is entitled to receive for the eriod from April 10 to May 1, 1980. That stipulation will be used to ispose of all questions pertaining to the calculation of back pay between omplainants' first discharge and their rehiring on or about May 1, 1980, ith a possible exception in the case of Complainant James Thacker, as ereinafter explained.

Exclusion of Back Pay for Period from April 9, 1981, to June 8, 1981

Although respondent's No. 1 Mine is not considered to be a "union" ine, respondent's mine was unable to produce coal from April 9, 1981, to une 8, 1981, because of the general strike called by the United Mine orkers of America during that time. Since complainants would not have een able to work during the strike even if they had not been discharged, ney are not entitled to back pay or interest on back pay for the period xtending from April 9, 1981, to June 8, 1981 (Tr. 1054; 1165).

ethod for Computing Back Pay for Each Complainant

. Thomas Walker

Thomas Walker was discharged by respondent on May 10, 1980. At the ime of his discharge, he was earning $73.20 per day. He began looking for nother job on June 6, 1980, when he applied for work at Greenwood Coal ompany and Tibbal Floor Company. He next sought work at Sterns Coal Compan

July 23, 1980, and returned to Sterns Coal Company and Tibbal Floor Company on August 6, 1980. He made two additional trips to Greenwood Coal Company on August 21, 1980, and August 27, 1980 (Tr. 977). He went on September 9, 1980, to the coal washer of Greenwood Coal Company which hires miners for Greenwood. On September 9, 1980, he also tried to get work again at West Coal Company and on September 19, 1980, he went back t Greenwood Coal Company. He returned to Greenwood's coal washer on October 1, 1980. He applied for work at a tent factory in Sterns, Kentuc on October 16, 1980, and on October 17, 1980, he returned to Greenwood Co Company to ask for work. He applied for a maintenance job at McNairy County Manufacturing Company on November 14, 1980. He returned to the te factory and Tibbal Floor Company on December 10, 1980, to ask for work (Tr. 979). When he returned to Greenwood Coal Company on December 19, 19 he was promised a job. He applied for work at A & S Coal Company on January 3, 1981. He updated his application at A & S Coal Company on January 16, 1981, and the foreman at A & S Coal Company told him to repor for work on February 2, 1981 (Tr. 979). The evidence shows that Walker made a conscientious effort to secure alternative employment after his discharge by respondent on May 10, 1980.

Walker was paid $72.00 per shift when he began working for A & S Coa Company. Walker was still working for A & S when he testified in this pr ceeding on November 17, 1981, and he was still being paid $72.00 per shif (Tr. 980). As compared with Walker's rate of pay at A & S, his rate of p at respondent's mine was $73.20. If Walker had continued working for re- spondent, his rate of pay would have increased by $5.60 to $78.80 on September 1, 1980 (Tr. 1165). Since Walker is entitled to be paid at the rate he would have earned if he had not been discharged on May 10, 1980, Walker is entitled to be paid at the rate of $73.20 from May 10, 1980, to September 1, 1980, and at the rate of $78.80 from September 1, 1980, to February 2, 1981, when he began to work for A & S (Tr. 979). Additionall Walker is entitled to be paid the difference of $6.80 between his A & S wages and the wages he would have been paid by respondent up to the time he was offered reinstatement on September 14, 1981, exclusive of payment differential during the strike, that is, from April 9, 1981, to June 8, 1981.

2. John Robert Telfer

John Robert Telfer was discharged by respondent on May 10, 1980. Immediately after his discharge, he started trying to find work. Between May 10, 1980, and October 31, 1980, he made unsuccessful trips about thre times each month to ask for work at Pikco Coal Company, Maxann Coal Compa V & M Coal Company, and Five S Coal Company. Telfer's father-in-law was foreman at Wolf Creek Collieries and on October 31, 1980, his father-in-l obtained a job for him at the No. 4 Mine of Wolf Creek Collieries (Tr. 99 997). His rate of pay at Wolf Creek's mine was $12.25 per hour, or $98.0

Although respondent's mine was much closer to Telfer's home than Wolf Creek's No. 4 Mine was, Telfer rode to and from work with his father-in-law without charge. As a foreman for Wolf Creek, his father-in-law was reimbursed by Wolf Creek for the gas used in traveling to and from work (Tr. 1007).

Wolf Creek's No. 4 Mine was divided into an "upper" and a "lower" mine. Management decided to close the upper mine. The closing of the upper mine made it necessary for Wolf Creek to lay off miners at the lowe mine so as to provide jobs for employees with considerable seniority who lost their jobs when the upper mine was closed. Telfer had only been working for Wolf Creek for a few months when the decision to close the upper mine was made. Telfer's lack of seniority made it necessary for Wolf Creek to lay him off on July 11, 1981 (Tr. 1008; 1019-1020). Telfer therefore, did not have any job on September 28, 1981, when respondent offered to reinstate him at its No. 1 Mine. Consequently, Telfer accepte respondent's offer of reinstatement and Telfer is now working for respondent even though he had stated at the hearing held on March 6 that he did not want to be reinstated at respondent's mine.

I stated at the hearing that the unique circumstances described above might qualify Telfer to back pay for the period between the time he lost his position with Wolf Creek on July 11 and the time he was reinstated by respondent on September 29. Respondent's counsel argued that respondent's back-pay obligation ought to be terminated on March 6, 1981, for any miner who testified on that day that he did not want to be reinstated. Respondent argued that that was especially the appropriate procedure in this proceeding because it was not respondent's fault that it has taken the complainants from March 17, 1981, when my bench decision was mailed to the parties, to November 17, 1981, for the hearing to be rescheduled at which complainants introduced the facts required for computation of back pay.

Counsel for complainants argued that Telfer should be paid for the time between his loss of the job at Wolf Creek and the time he was reinstated by respondent because Telfer was among those miners who had from the beginning supplied him with information for computation of back pay. Therefore, Telfer was not responsible for the delay in providing information pertaining to calculation of back pay (Tr. 1010).

As I indicated in the first part of this decision, complainants are entitled to back pay up to the time they were offered reinstatement which in Telfer's case, was September 29, 1981 (Tr. 1007). Consequently, Telfer is entitled to back pay from May 10, 1980, to October 31, 1980, when he began working for Wolf Creek at a rate of $98.00 per day. Telfer

1980, and $84.80 ($79.20 + pay increase of $5.60) per day for all times after September 1, 1980.

3. Clyde Smith, Jr.

Clyde Smith, Jr., was discharged by respondent on May 10, 1980 (Tr. 1023). Between May 10, 1980, and November 3, 1980, he applied for work at Tab Coal Company, Triple J Coal Company, Loftis Coal Company, and Doug Chapman. He went to those places several times and all of them advised him that they were not hiring any miners at that time. Finally, Smith obtained a job with Robert Coal Company on November 3, 1980, and he has been employed by Robert Coal Company since that time, although at the time of the hearing, he was not working because of a back injury (Tr. 1025; 1030-1032).

Counsel for complainants stated that Smith had not only been prompt about providing him with information about Smith's own efforts to find work, but had also been helpful in assisting him in obtaining information from the other complainants (Tr. 1023). Consequently, no reductions in back pay would be appropriate in Smith's case because he has in no way contributed to the delay in providing the facts needed for computing back pay.

Smith was paid at the rate of $73.20 per day when he worked for respondent. Robert Coal Company paid Smith from $76.20 to $79.20 per day (Tr. 1024). Therefore, Smith is not entitled to receive any differential between the rate he was paid by respondent and the rate he was paid by Robert Coal Company, but he is entitled to back pay for the period from May 10, 1980, when he was discharged, to November 3, 1980, when he began working for Robert Coal Company. The rate for that period is $73.20 per day from May 10, 1980, to September 1, 1980, and $78.80 ($73.20 + pay increase of $5.60) per day from September 1, 1980, to November 3, 1980.

4. Monroe Mullins

Monroe Mullins was discharged by respondent on May 10, 1980. At the time of his discharge, respondent was paying Mullins $79.20 per day (Tr. 1035). Mullins asked for work at Loftis Coal Company and Teresa Coal Company. He only looked for work at those two places because they are located in Kentucky and Mullins is from Virginia. Mullins wanted to find work in Virginia and moved back to Virginia about July 5, 1980. Mullins was given a job in Virginia with Dyna-Carb Coal Company on July 10, 1980, at a pay rate of $75.00 per day (Tr. 1035-1036). Mullins worked for Dyna-Carb up to about November 25, 1980 (Tr. 1037). Mullins was able to obtain a job working for Tab Coal Company. Mullins continued to work for Tab Coal Company up to March 6, 1981, when the first hearing in this case was held. He testified on March 6 that he would like to be reinstated to

his job at respondent's mine because on March 6 he did not have a job that paid as much as respondent was paying him when he was discharged (Tr. 105

Although Mullins could have continued to work for Tab Coal up to the beginning of the UMWA strike, Mullins elected to terminate his job with T Coal on Monday, March 9, 1980, because he knew that the UMWA strike was s to begin toward the end of March and Mullins had already decided that he wanted to move back to Virginia. Mullins next found a job on June 20, 19 when he began to work for Dotson Coal Company (Tr. 1043). He transferred Smiley Coal Company when Smiley offered him $5 more per day than Dotson w paying him. Mullins worked for Smiley until that company went out of bus Thereafter Mullins obtained a job with T.J.P.E. Coal Company at a rate of $80.00 per day and Mullins was still working for T.J.P.E. Coal Company wh respondent offered to reinstate him on or about September 14, 1981. Mull declined respondent's offer of a job because he liked working for T.J.P.E more than he liked working for respondent (Tr. 1045). Mullins testified that he lost no working time between his jobs at Dotson, Smiley, and T.J. (Tr. 1043).

Mullins did not have a job for a short period of time between the ti that he left Dyna-Carb and his obtaining work with Tab Coal Company on January 1, 1981. At the hearing held on November 17, 1981, Mullins did n know when he stopped working for Dyna-Carb. I asked Mullins to obtain th information and submit it to me after the hearing, but respondent's couns objected to my giving Mullins any additional time to obtain that informat since he had already been given a period of 8 months between the two hear held in this proceeding within which to obtain all dates and places where had worked (Tr. 1057). Mullins' own counsel testified that Mullins had b sent a letter a long time prior to the hearing requesting him to obtain h dates and places of employment (Tr. 1046). In the first part of this ord I ruled that respondent would not be required to reimburse complainants f back pay when their testimony shows that they had contributed to undue de by failing to provide information in a timely manner. In keeping with th ruling, respondent will not be required to provide back pay for the time lost by Mullins between the termination of his job with Dyna-Carb and the commencement of his job with Tab Coal Company. Also, since Mullins volun tarily stopped working for Tab Coal Company on March 9, 1981, before the strike began, he will not be given back pay for the period from March 9, 1981, to April 9, 1981, when respondent's mine was closed by the strike. Inasmuch as Mullins' voluntary act of quitting his job at Tab Coal Compan also prevented him from having a job after the strike ended on June 8, 19 respondent will not be required to provide Mullins with back pay for the period from June 8, 1981, when respondent's mine was reopened after the strike, to June 20, 1981, when Mullins began to work for Dotson Coal Company (Tr. 1050). Of course, no complainant will receive back pay for the period from April 9, 1981, to June 8, 1981, because respondent's mine was closed for that period on account of the strike (Tr. 1054).

which Dotson was paying him (Tr. 1040). Later Mullins testified that Smiley only paid him $75.00 per day (Tr. 1047). Additionally, Mullins first testified that his job with Dotson Coal Company lasted for 3 months after he began working for Dotson on June 20, 1981 (Tr. 1040). That would mean that Mullins worked for Dotson until September 20, 1981. Mullins also testified that he started working for Smiley after leaving Dotson and that Smiley went out of business about the last of July (Tr. 1040). It would have been impossible for Mullins to have worked for Dotson until September and then to have worked for a company which went out of business toward the end of July. In view of Mullins' inability to give the dates when his employment with Dyna-Carb ended and his employment with Smiley began and ended, respondent will not be required to pay Mullins the differential of $4.20 between his rate of pay of $79.20 received from respondent and the pay of $75.00 per day paid by both Dyna-Carb and Dotson because it is impossible to determine on the basis of Mullins' testimony when he ceased to be paid $75.00 and when he began to be paid $80.00 per day. The foregoing ruling is consistent with my prior holding that respondent should not be required to reimburse complainants when they are unable to provide the names of the companies for which they worked, the dates they began to work and stopped working, and their rates of pay even though they had been given a period of 8 months within which to prepare such information.

Based on the rulings made above, respondent is required to provide Mullins with back pay at the rate of $79.20 per day for the period from his discharge on May 10, 1980, to July 10, 1980, when Mullins began working for Dyna-Carb Coal Company.

5. James R. Clevenger

James R. Clevenger was discharged by respondent on May 10, 1980, and at the time of his discharge, respondent was paying him $79.20 per day (Tr. 1061-1062). Clevenger started drawing unemployment compensation a short time after his discharge and continued to draw it for about 16 months (Tr. 1070; 1077). Clevenger testified that he tried to obtain work at all places which were within a reasonable distance of his home in Hatfield, Kentucky (Tr. 1073). He applied for work at Big Hill Coal Corporation on July 21, 1980, and on August 4, 1980, he asked Loftis Coal Company for work He went to Barbar Kay Coal Company to seek a job on August 19, 1980, and August 27, 1980. He asked Robert Coal Company for a job on September 8, 1980. He sought work with Preece Coal Company on October 17, 1980, and on July 24, 1980, he tried to get a job in the auto body shop of Hubbard Motor Company. He tried to find work at J & H Coal Company on November 10, 1980, and with Big Hill Coal Corporation on December 1, 1980. About April 1981, he tried to get a job driving a truck for Roy Francis (Tr. 1063-1065).

Clevenger did not try to find work very often between April 1981 and September 14, 1981, when he accepted respondent's offer to reinstate him at respondent's mine (Tr. 1064). Clevenger said that he did not have the

for him to find work (Tr. 1070).

Clevenger testified that he believed he had tried very hard to find work and that he would rather have had a job than to have been drawing unemployment compensation because he could earn the amount of an unemployment check by working only 2 days at a coal mine (Tr. 1075). There is no doubt but that Clevenger had an economic incentive to earn money because he is separated from his wife and is supposed to provide $250 per month for the support of two children (Tr. 1078). During 1980, he only sent his children about $600 and he apparently accomplished that primarily by selling his car. The only transportation he had for getting to and from work is a 1947 model truck. He had to borrow $100 from his brothers in order to replace the engine in the truck before he could drive it to and from work (Tr. 1080-1081).

I find that Clevenger made a reasonable effort to obtain work after his discharge on May 10, 1980. There is nothing in the record to show that he is responsible in any way for the delay which occurred between the first and second hearings in this proceeding. Therefore, respondent should pay Clevenger back pay from the date of his discharge on May 10, 1980, to the date of his reinstatement on September 14, 1981, at the rate of $79.20 per day for the period from May 10, 1980, to September 1, 1980, and at the rate of $84.80 ($79.20 + pay increase of $5.60) per day for the period from September 1, 1980, to September 14, 1981, exclusive of the period from April 9, 1981, to June 8, 1981, when respondent's mine was closed on account of the strike (Tr. 1054; 1165).

6. Jerry Lee Smith

Jerry Lee Smith was discharged by respondent on May 10, 1980, and respondent was paying Smith $79.20 per day at the time of his discharge (Tr. 1083-1084). Smith first obtained a job with Big Hill Coal Corporatic on September 24, 1980, but he was laid off from that job only 3 days later. His salary for those three days was greater than the amount he was receiving when he was working for respondent (Exh. 20; Tr. 1091). Smith next obtained a job with Robert Coal Company on October 12, 1980, ar Smith worked for Robert Coal until March 14, 1981, when he told management that he no longer wished to work for them because the mine released methane (Tr. 1093; 1096). Smith did not obtain any other employment between March 14, 1981, and September 14, 1981, when he accepted responde offer of reinstatement. Smith testified that he did seek work during the months of May, June, and July with Loftis Coal Company, Preece Coal Company, Triple J Coal Company, and Thacker Energy (Tr. 1088-1089). Smith brought notes from at least three individuals stating that he had been to the aforementioned companies' places of business to ask for work (Exhs. 22, 23, and 24).

that he voluntarily stopped working for Robert Coal Company because he was afraid to work in a mine known to release methane could possibly be considered as a reason for disallowing back pay, but I believe that he should be paid for the period between his decision to stop working in a gassy mine because he did try to find work in nongassy mines in the interim between his leaving Robert Coal Company and his reinstatement at respondent's mine. Under the Act, an unlawfully discharged miner has a right to be made "whole" to the extent possible. Smith was working in respondent's nongassy mine up to the time of his discharge on May 10, 1980. He should not be denied back pay because he chose to stop working in a mine which was more hazardous than respondent's mine. Therefore, I find that Smith should be provided back pay for the period between his departure from Robert Coal Company to the time of his reinstatement at respondent's mine.

Consistent with the facts given above and the ruling made above, Jerry Lee Smith should be awarded back pay at the rate of $79.20 per day from May 10, 1980, to September 1, 1980. He should be awarded back pay at the rate of $84.80 ($79.20 + pay increase of $5.60) per day from September 1, 1980, to September 24, 1980, when he began working for Big Hill Coal Corporation. He only worked through September 26, 1980, for Big Hill before he was laid off. He should, therefore, be awarded back pay at the rate of $84.80 per day from September 29, 1980, to October 12, 1980, when he began working for Robert Coal Company. Smith stopped working for Robert Coal Company on March 14, 1981. Consequently, he should be awarded back pay at the rate of $84.80 per day from March 16, 1981, to September 14, 1981, exclusive of the period from April 9, 1981, to June 8, 1981, when the mine was closed because of the strike. Smith is not entitled to be paid any differential between the rate of pay he received at respondent's mine and the rate he was paid by his other employers because all other employers either paid him the same wages he received from respondent, or more than he was receiving when he worked at respondent's mine (Tr. 1086).

7. David May

David May was discharged by respondent on May 10, 1980, and at that time he was being paid $68.56 per day by respondent (Tr. 1111; 1113). He tried to obtain work in May 1980 with Tab Coal Company. He asked for work with V & M Coal Company in October 1980 (Tr. 1112). He asked for work with Robert Coal Company in October 1980 (Tr. 1112). He also tried to get a job with V & M Coal Company. Although he was unsure about the date of his filing of an application for work with V & M Coal Company, he introduced as Exhibit 27 a note signed by Lorie Chafin stating that he had "put in an application here approximately 3 weeks ago" (Tr. 1119). May was finally able to get a job with Dot Coal Energy on January 9, 1981, and May was still working for Dot Energy on November 17, 1981, when he testified in this proceeding. May declined respondent's offer of reinstatement in September of 1981 because Dot Energy has paid him wages at a higher rate than he was paid by respondent (Tr. 1114-1115).

to work for Dot Coal Energy.

8. H. K. Tilley, Jr.

H. K. Tilley, Jr., was discharged by respondent on May 10, 1980 (Tr. 1129) at which time respondent was paying him $73.20 per day (Tr. Tilley tried to obtain a job with Northern Coal Company on May 28, 1980 29; Tr. 1133). He asked for work at Stemco on June 14, 1980 (Exh. 30; Tr. 1134). He inquired about work with Cooks Trucking in June 1980 (Tr 1138). He sought work with LMB River Coal Company on July 15, 1980 (Ex 31; Tr. 1135). He tried to get a job with T & B Tire Sales on August 2 1980 (Tr. 1134). He also asked for a job at Ratliff Trucking, Inc., on November 12, 1980 (Exh. 33; Tr. 1135). Tilley introduced as Exhibits 2 through 33 various notes stating that he had made inquiries about obtai work at the places mentioned above; additionally, Tilley testified that made about six trips to each of the aforementioned places in an effort find work (Tr. 1132).

Tilley did not obtain a job until June 11, 1981, when he began to work for LMB River Coal Company. Even though Tilley was working for LM River Coal Company when respondent offered to reinstate him at responde mine, Tilley accepted respondent's offer and began working again for re spondent on September 14, 1981 (Tr. 1159). Tilley returned to work at respondent's mine because LMB River Coal was considering closing its mi and because LMB River Coal's mine was "low" coal which had caused Tille to injure his wrist (Tr. 1139). When Tilley began working for LMB Rive Coal, he was paid wages at the rate of $80.00 per day; therefore, he is not entitled to be paid any differential between the amount he earned a respondent's mine and the amount he was paid by LMB River Coal (Tr. 113 Tilley injured his wrist again shortly after he returned to work for re spondent and, at the time of the hearing on November 17, 1981, he had b off from work because of his injured wrist and because his teeth were abscessed and were giving him a great deal of trouble (Tr. 1157-1158).

Respondent's counsel cross-examined Tilley at some length, as he d several of the witnesses, about their injuries and lack of motivation i obtaining jobs sooner than they did (Tr. 1141-1160). I find that Tille testimony is sufficiently credible to show that he made a reasonable an satisfactory effort to find work after he was discharged by respondent. The description which he provided of the type of injury he suffered and the kinds of treatment he has been given support a finding that he did feign injuries just to be off from work (Tr. 1156-1157). The fact that was out of work for well over a year with no income other than unemploy compensation would explain why he was unable to pay a dentist to stop t deterioration of his teeth (Tr. 1157-1158). During the period of his u employment, he lived with his mother-in-law part of the time. It was necessary for him to sell his trailer for $1,000 (Tr. 1136). None of t

crease of $5.60) per day from September 1, 1980, to June 11, 1981, when he obtained a job with LMB River Coal Company, exclusive of the period from April 9, 1981, to June 8, 1981, when respondent's mine was closed because of the strike (Tr. 1054; 1165). As stated above, no differential need be paid because his wages with LMB River Coal were higher than the amount he would have received had he continued working for respondent, even if one takes into account respondent's pay increase of September 1, 1980.

9. James Thacker

Counsel for complainants stated at the hearing that James Thacker had attended a meeting on Monday, November 16, 1981, the day prior to the day of reconvening the hearing in this proceeding, and that Thacker had stated on Monday that he could not be away from work any longer than Monday. Thacker was, therefore, not present to testify in support of his request for payment of back wages (Tr. 1160). Complainants' counsel also explained that Thacker had obtained work after the discharge on May 10, 1980, more quickly than any of the other complainants. Thacker, in fact, worked for Teresa Coal Company between the time he was first discharged on April 10, 1980, and the date of May 1, 1980, when all of complainants were offered jobs after the first discharge (Tr. 1163). Complainants' counsel further stated that a calculation had been made which showed that Thacker was entitled to 25 days of back pay (Tr. 1162-1163).

Based on the facts provided by complainants' counsel, Thacker would be entitled to back pay at the rate of $73.20 (Tr. 1163) for the period from May 10, 1980, to June 9, 1980, when Thacker began to work for Triple J Coal Company (Tr. 1161). There were 20 working days between May 10, 1980, and June 9, 1980. Therefore, the remaining 5 working days for which Thacker is entitled to receive back pay occurred between the first discharge on April 10, 1980, and the second discharge on May 10, 1980. As I have previously explained in this order, the parties entered into a stipulation as to the amount of back pay to which each complainant is entitled for the period from April 10, 1980, to May 10, 1980 (Exh. 4). Under that stipulation, Thacker is said to be entitled to back pay for a period of 14-3/4 days, instead of the 5 days specified by complainants' counsel. The stipulation must have been negotiated before counsel for the parties were aware of the exact facts with respect to Thacker. Therefore, the parties are at liberty to amend the number of hours for which Thacker is entitled to be paid between April 10 and May 10, 1980, or they may deduct days from the 20 days between May 10 and June 9, 1980, in determining the amount of back pay to which Thacker is entitled. In no event should respondent pay Thacker for more than 25 days of back pay because some of the other complainants have had their back pay reduced for failure to produce the dates on which they began to work, or ceased to work, for other employers. Since Thacker did not appear at the hearing in support of his claim for back pay, he must be held to be entitled only to the 25

Award of Interest

Section 105(c)(2) of the Act provides that any miner who has been discharged in violation of section 105(c)(1) is entitled to reinstatem "* * * to his former position with back pay and interest". The Act do not specify the rate of interest which should be paid. In my decision issued in Local Union 1374, District 28, UMWA v. Beatrice Pocahontas C Docket No. VA 80-167-C, issued August 27, 1981, 3 FMSHRC 2004, I order miners to be compensated with interest at a rate of 12 percent per ann I based the 12-percent rate on the fact that the Internal Revenue Serv was paying that rate or requiring taxpayers to pay that rate in connec with overpayment or underpayment of taxes. The miners in this proceed were discharged during a period when interest rates were as high as th have ever been. They would no doubt have had to pay at least 12 perce interest if they had tried to borrow money during the period of their unemployment. Therefore, I believe that the back pay which is require be awarded in this proceeding should be made at a rate of 12 percent interest.

The parties may defer computing interest until after my final dec awarding back pay is issued because interest will continue to run unti date of payment. The parties may, therefore, prefer to make the inter calculations only once, that is, on the date of payment.

WHEREFORE, for the reasons given above, it is ordered:

(A) Counsel for respondent and counsel for complainants shall co for the purpose of cooperating in computing the amount of back pay whi is due to each of the nine complainants, following the procedures whic have hereinbefore specified for each of the complainants.

(B) Counsel for respondent and counsel for complainants shall su me with the amounts due each complainant on or before February 8, 1982

(C) The amounts due each complainant for the period from April 1 1980, to May 1, 1980, are those stipulated to by the parties in Exhibi except for a possible adjustment which counsel may wish to make in awa Complainant James Thacker back pay for a period of 25 days.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Darryl A. Stewart, Attorney, Office of the Solicitor, U. S. Department of Labor, Rm. 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Charles E. Lowe, Esq., Attorney for Mullin Creek Coal Company, Inc., Lowe, Lowe & Stamper, P. O. Box 69, Pikeville, KY 41501 (Certified Mail)

LOWE & LOWE
ATTORNEYS AT LAW
SECOND STREET
PIKEVILLE, KENTUCKY 41501

S E. LOWE
S E LOWE JR

TELEPHONE (606)
OFFICE 437-7213 &
RES 437-7615 & 43

January 26, 1982

Mr. Darryl J. Stewart
Office of the Solicitor
280 U. S. Courthouse
801 Broadway
Nashville, Tennessee 37203

RE: Secretary of Labor, on behalf of Clyde Jr. Smith, et al
vs.
Mullin Creek Coal Company,
Docket No. KENT 81-17-D

Dear Sir:

The company's bookkeeper has just called me and stated that your figures in the above captioned matter appears to be correct, including vacation pay and according to the ruling of the Administrative Law Judge.

I am enclosing a copy of your calculations with a copy of this letter to the Judge for compliance with the Order to have this to him before February 8, 1982.

I remain.

Yours very truly,

Charles E. Lowe
Attorney at Law

CEL/ar

cc: Hon. Richard C. Steffey
Administrative Law Judge
Federal Mine Safety and Health Review Commission

NASHVILLE, TENNESSEE 37203
615-251-5818

SOL/DAS/DCB

anuary 22, 1982

. Charles E. Lowe
ttorney at Law
ost Office Box 69
kkeville, Kentucky 41501

: Secretary of Labor, on behalf of Clyde Jr. Smith, et al v. Mullin Creek Coal Company, Inc.
Docket No. KENT 81-17-D

ar Mr. Lowe:

accordance with Judge Steffey's January 12, 1982 Order, please nd stated below our computations of the gross back wages, clusive of interest, due to each of the nine complainants volved in the proceeding stated above.

) Thomas V. Walker

e 15 days'	pay for May, 1980 at $73.20 per day =	$ 1,098.00
e 21 days'	pay for June, 1980 at $73.20 per day =	1,537.20
e 22 days'	pay for July, 1980 at $73.20 per day =	1,610.40
e 21 days'	pay for August, 1980 at $73.20 per day =	1,537.20
e 22 days'	pay for September, 1980 at $78.80 per day =	1,733.60
e 23 days'	pay for October, 1980 at $78.80 per day =	1,812.40
e 19 days'	pay for November, 1980 at $78.80 per day =	1,497.20
e 22 days'	pay for December, 1980 at $	
e 21 days'	pay for January, 1981 at $	
e 20 days'	pay for February, 1981 at	
e 22 days'	pay for March, 1981 at $	
e 6 days'	pay for April, 1981 at	
e 0 day's	pay for May, 1981 at $(	
e 16 days'	pay for June, 1981 at $	
e 23 days'	pay for July, 1981 at $	

Due 15 days' pay for May, 1980 at $79.20 per day =	$ 1,188.
Due 21 days' pay for June, 1980 at $79.20 per day =	1,663.
Due 22 days' pay for July, 1980 at $79.20 per day =	1,742.
Due 21 days' pay for August, 1980 at $79.20 per day =	1,663.
Due 22 days' pay for September, 1980 at $84.80 per day =	1,865.
Due 22 days' pay for October, 1980 at $84.80 per day =	1,865.
Due 15 days' pay for July, 1981 at $84.80 per day =	1,272.
Due 21 days' pay for August, 1981 at $84.80 per day =	1,780.
Due 21 days' pay for September, 1981 at $84.80 per day =	1,780.
Subtotal =	$14,821.
Agreed stipulated amount for period April 10, 1980 through May 1, 1980	1,158
Total =	$15,979

(3) Clyde Smith, Jr.

Due 15 days' pay for May, 1980 at $73.20 per day =	$ 1,098.
Due 21 days' pay for June, 1980 at $73.20 per day =	1,537.
Due 22 days' pay for July, 1980 at $73.20 per day =	1,610.
Due 21 days' pay for August, 1980 at $73.20 per day =	1,537.
Due 22 days' pay for September, 1980 at $78.80 per day =	1,733.
Due 23 days' pay for October, 1980 at $78.80 per day =	1,812.
Due 1 day's pay for November, 1980 at $78.80 per day =	78.
Subtotal =	$ 9,407.
Agreed stipulated amount for period April 10, 1980 through May 1, 1980	1,070.
Total =	$10,478.

(4) James R. Clevenger

Due 15 days' pay for May, 1980 at $79.20 per day =	$ 1,188.
Due 21 days' pay for June, 1980 at $79.20 per day =	1,663.
Due 22 days' pay for July, 1980 at $79.20 per day =	1,742.
Due 21 days' pay for August, 1980 at $79.20 per day =	1,663.
Due 22 days' pay for September, 1980 at $84.80 per day =	1,865.
Due 23 days' pay for October, 1980 at $84.80 per day =	1,950.
Due 19 days' pay for November, 1980 at $84.80 per day =	1,611.
Due 22 days' pay for December, 1980 at $84.80 per day =	1,865.

Due 23 days' pay for July, 1981 at $84.80 per day =		1,950.4
Due 21 days' pay for August, 1981 at $84.80 per day =		1,780.8
Due 9 days' pay for September, 1981 at $84.80 per day =		763.2
	Subtotal =	$25,252.0
Agreed stipulated amount for period April 10, 1980 through May 1, 1980		1,158.
	Total =	$26,410.

(5) Jerry L. Smith

Due 15 days' pay for May, 1980 at $79.20 per day =	$ 1,188.0
Due 21 days' pay for June, 1980 at $79.20 per day =	1,663.2
Due 22 days' pay for July, 1980 at $79.20 per day =	1,742.4
Due 21 days' pay for August, 1980 at $79.20 per day =	1,663.2
Due 19 days' pay for September, 1980 at $84.80 per day =	1,611.2
Due 8 days' pay for October, 1980 at $84.80 per day =	678.4
Due 12 days' pay for March, 1981 at $84.80 per day =	1,017.6
Due 6 days' pay for April, 1981 at $84.80 per day =	508.8
Due 0 day's pay for May, 1981 at $0 per day =	
Due 16 days' pay for June, 1981 at $84.80 per day =	1,356.8
Due 23 days' pay for July, 1981 at $84.80 per day =	1,950.4
Due 21 days' pay for August, 1981 at $84.80 per day =	1,780.8
Due 9 days' pay for September, 1981 at $84.80 per day =	763.2
Subtotal =	$15,924.0
Agreed stipulated amount for period April 10, 1980 through May 1, 1980	1,158.3
Total =	$17,082.

(6) David May

Due 15 days' pay for May, 1980 at $68.56 per day =	$ 1,028.4
Due 21 days' pay for June, 1980 at $68.56 per day =	1,439.7
Due 22 days' pay for July, 1980 at $68.56 per day =	1,508.3
Due 21 days' pay for August, 1980 at $58.56 per day =	1,439.7
Due 22 days' pay for September, 1980 at $74.16 per day =	1,631.5
Due 23 days' pay for October, 1980 at $74.16 per day =	1,705.6
Due 19 days' pay for November, 1980 at $74.16 per day =	1,409.0
Due 22 days' pay for December, 1980 at $74.16 per day =	1,631.5
Due 6 days' pay for January, 1981 at $74.16 per day =	444.9

Due 21 days' pay for June, 1980 at $73.20 per day =
Due 22 days' pay for July, 1980 at $73.20 per day =
Due 21 days' pay for August, 1980 at $73.20 per day =

Due 22 days' pay for September, 1980 at $78.80 per day =
Due 23 days' pay for October, 1980 at $78.80 per day =
Due 19 days' pay for November, 1980 at $78.80 per day =
Due 22 days' pay for December, 1980 at $78.80 per day =
Due 21 days' pay for January, 1981 at $78.80 per day =
Due 20 days' pay for February, 1981 at $78.80 per day =
Due 22 days' pay for March, 1981 at $78.80 per day =
Due 6 days' pay for April, 1981 at $78.80 per day =
Due 0 day's pay for May, 1981 at $78.80 per day =
Due 2 days' pay for June, 1981 at $78.80 per day =

Subtotal = $

Agreed stipulated amount for period April 10, 1980 through May 1, 1980

Total =

(8) Monroe Mullins

Due 15 days' pay for May, 1980 at $79.20 per day = $
Due 21 days' pay for June, 1980 at $79.20 per day =
Due 6 days' pay for July, 1980 at $79.20 per day =

Subtotal = $

Agreed stipulated amount for period April 10, 1980 through May 1, 1980

Total =

(9) James Thacker

Due 83 hours' pay for May 10, 1980 to June 9, 1980 at $9.15 per hour =

Agreed stipulated amount for period April 10, 1980 through May 1, 1980 =

Total =

If your computations are not the same as ours, please call here in Nashville at 615-251-5818 so that we may discuss o differences prior to the required February 8, 1982 submiss Judge Steffey.

ing Associate Regional Solicitor

ARRYL A. STEWART
ttorney

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 81-222-R
	:	Citation No. 805557; 12/30/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Blacksville No. 2 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 81-361
	:	A/O No. 46-01968-03076
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION AND ORDER

The captioned review-penalty proceeding is before me on reassignment from Judge Cook who held a consolided hearing in McHenry, Maryland on July 28, 1981.

There is no genuine dispute as to any of the material facts. 1/ The dispositive issue is whether as a matter of law 30 C.F.R. 70.201(d) 2/ mandates corrective action dust sampling on each production shift during the time fixed for abatement.

1/ The operator's claim that inculpatory statements to Inspector Ryan by the operator's safety superintendent were inadmissible hearsay is without merit. FRE 801(d)(2)(C), (D). Under the Federal Rules of Evidence statements made to a declarant by an authorized agent of a party acting within the scope of his employment are excluded from the category of hearsay. As the Advisory Committee Note shows no guarantee of trustworthiness is required in the case of such an admission. The lack of merit in the objection was underscored when counsel for the operator chose to elicit the same inculpatory information from the operator's dust foreman, Mr. Reese (Tr. 67). This was later confirmed in questioning by the trial judge (Tr. 81).

2/ The standard provides:

"During the time for abatement fixed in a citation for violation of [the respirable dust standards], the operator shall take [personal]

as in this case, the time fixed for abatement was some 32 days, the operator's interpretation would permit several production shifts to be run without sampling prior to the time fixed for abatement.

Counsel for MSHA claims the proper interpretation is the "very first production shift" following the accomplishment of corrective adjustments to the operator's dust control system. The operator concedes it did not begin sampling until the second production shift after corrective action was taken.

Both interpretations are at variance with the statutory directive that underlies the improved standard. The standard issued in April 19 is a paraphrase of section 104(f) of the Mine Safety Law, which is identical with old section 104(i) of the Coal Act, 30 U.S.C. § 814(f). The statute provides that after a notice of violation of the respirabl dust standard issues "fixing a reasonable time for abatement of the violation," the operator "[d]uring such time," shall "cause samples . . . to be taken of the affected area during each production shift." Under the plain and unambiguous language of the statute it is clear th "during the time fixed for abatement," here the 32 days, the operator was obligated to take dust samples "during each production shift" and not just on the production shifts that came after corrective action wa taken.

Since it would do violence to the Congressional intent and to established canons of construction of remedial legislation to construe the improved standard more narrowly than the statute, I find the phras "and then" as used in the improved standard means "during the time fix for abatement." 4/ For these reasons, I conclude the failure to sampl on the first production shift after corrective action was taken was a violation of 30 C.F.R. 70.201(d).

Because the operator failed to sample during only one production shift after compliance was achieved the miners were not exposed to any

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3/ This provides:

"If, based upon samples taken, analyzed, and recorded pursuant to section 202(a), . . . the applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded an thereby violated, the Secretary or his authorized representative shall issue a citation fixing a reasonable time for the abatement of the violation. During such time, the operator of the mine shall cause samples described in section 202(a) to be taken of the affected area during each production shift . . . ."

4/ Under section 101(a)(9), 30 U.S.C. § 811(a)(9), no improved standar

effect since 1970. That ignorance of the law is no defense applie whether the law be a statute or a duly promulgated and published regulation. United States v. International Minerals & Chemical Co 402 U.S. 558, 563 (1971).

For these reasons, and after considering the other statutory criteria, I conclude the amount of the penalty warranted for the v tion found is $150.00.

Accordingly, it is ORDERED that the operator pay the penalty assessed, $150.00, on or before Friday, February 26, 1982, and tha subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Samuel Skeen, Jr., Esq., Consolidation Coal Company, 1800 Washi Road, Pittsburgh, PA 15241 (Certified Mail)

David E. Street, Esq., Office of the Solicitor, U.S. Department Labor, 3535 Market St., Philadelphia, PA 19104 (Certified M

SKYLINE TOWERS NO. 2, 10TH FLOOR
5205 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 9

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation and Order
	:	Docket No. WEVA 82-11-R
v.	:	Citation No. 858823; 9/10/81
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 82-12-R
	:	Order No. 8588 23; 9/10/81
	:	
	:	Blacksville No. 2 Mine

DECISIONS

Appearances: Jerry F. Palmer and Juanita M. Littlejohn, Esquires, Pittsburgh, Pennsylvania, for the Contestant; Howard K. Agran, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern two contests filed by the contestant on October 13, 1981, pursuant to sections 104(d) and 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. challenging the propriety and legality of a section 104(a) citation and a section 107(a) imminent danger withdrawal order issued by Federal Mine Inspector Cecil M. Branhan on September 10, 1981, after inspection of the subject mine.

Respondent filed timely answers in these contests asserting that the citation and order were properly issued, and pursuant to notice served on the parties, a hearing was held in Washington, Pennsylvania on January 1 1982, and the parties appeared and participated fully therein.

Discussion

The section 107(a) - 104(a) citation-order issued by inspector Branhan on September 10, 1981, no. 858823, states the following alleged "condition or practice":

the roof, and 33 inches from the face and air samples were taken.

Inspector Branham cited a violation of mandatory safety standard 30 CFR 75.301, and also made a finding that the alleged violation was "significant and substantial." He also found that the area affected by his order was "the No. 5 entry of the G Bleeder section from survey sta 5698 to the face (94 feet)."

Stipulations

The parties stipulated to the following:

1. The Blacksville No. 2 Mine is owned and operated by contestant, and is subject to the provisions of the Act.

2. The presiding Administrative Law Judge has jurisdiction to hear and decide these cases.

3. MSHA Inspector Cecil M. Branham is a designated authorize representative of the Secretary of Labor and properly se the citation in question on a representative of the cont in accordance with sections 104 and 107 of the Act.

4. A true and correct copy of the citation-order may be adm as part of the record in this case.

Testimony and evidence presented by the respondent MSHA.

MSHA Inspector Cecil M. Branham testified as to his background an experience and confirmed that he issued the citation in question after a regular inspection at the mine on September 10, 1981. He identified of exhibit C-1 as a sketch of the five entries on the G bleeder area i question and he testified as to what he found during his inspection. testified that he took several methane readings with his G-7 methanome near the continuous miner parked at the face of the No. 5 entry, as we as at the face itself after additional roof support was installed at the face. His readings ranged from 2.2 to 3.0, and he averaged it out 2.6 and that is what he recorded on the face of the citation.

Inspector Branham testified that no mining was taking place at th No. 5 face, the power was off, the continuous miner was not energized, the fan was not running and no miners were working in the area. He ma permissibility inspection, took no air readings at the face, but did take an air reading outby the face and fan location shown on exhibit C and recorded 23,000 cubic feet of air per minute at that location.

to him that the air and ventilation in the area was not sufficient to carry away, dilute, or render the methane harmless.

With regard to the imminent danger portion of the citation which he issued in Docket WEVA 82-12, Mr. Burnham stated that he followed the MSHA policy guidelines set forth in the inspector's manual under section 75.308 which states that the presence of methane in excess of 1.5 may suppor an imminent danger withdrawal order. He also indicated that there were no indications that mine management was aware of the presence of methane at the face or was doing anything to correct the situation. He confirmed that the methane condition was corrected within an hour or so by adjustments made to the line curtain which had been installed along the left side of the rib. The curtain was tightened up, slack was taken up, and another plastic curtain was installed across the face near the miner and this reduced the methane level to the allowable limits.

Mr. Burnham confirmed that the continuous mining machine would de-energize in the event dangerous levels of methane were encountered, but he saw no indications that the face area had been dangered off. After recording his methane readings he orally advised inspector escort Delbert Eddy that the "section was on order". He remained in the area while the abatement was in process and subsequently terminated the order at 11:15 a.m. after the methane levels were reduced below the 1.0 level. He believed that the adjustments made to the line curtain cured the problem.

Contestant's Testimony

Roy D. Stone, testified that he has been employed by the contestant as a section foreman for the past ten years. He detailed his normal routine concerning his inspection of the section prior to commencing mining activities and stated that on September 10, 1981, he examined all five faces in the G bleeder section and recorded his findings in the fire boss book. He confirmed that he found methane is the number 5 entry face area and stated that it amounted to .6 or .7 on the left side of the miner and a little better than 1 or 1.5 on the right side although he could not take a methane recording directly at the face because of lack of roof support, he believed that it probably exceeded the levels which he detected by means of his methane detector, and it probably reached a level of 2.5 or 3.0.

Mr. Stone stated that when he discovered the presence of methane he proceeded to take corrective action by means of making adjustments to the existing ventilation curtain. This was done by tightening up the curtain which had been sagging from the roof because it was wet and weighting down the bottom portion which had been "flying around."

Mr. Stone stated that when he detected the presence of methane in the working place in question he proceeded to take corrective action and he

placed on the section at the time abatement efforts were going on and maintained that he was in the process of attempting to adjust the ventila to get rid of the methane at the time that the corrective action was initiated by inspector Burnham.

Findings and Conclusions

At the conclusion of the testimony of Mr. Stone, the parties advise me that after further joint consideration of the matter a proposed compromise was reached which would enable the contestant to withdraw its contests on the basis of the following agreements and stipulation freely entered by counsel for both sides:

1. Contestant will withdraw its contest with respect to that portion of citation 8588823 which alleges a violation of 30 CFR 75.301, and contestant no longer desires to contest the issuance of the section 104(a) citation which charges contestant with a violation of mandatory safety standard 75.301.

2. Respondent MSHA will vacate that portion of citation 8588823 which alleges that the condition or practice described by Inspector Burnham constituted imminent danger under section 107(a) of the Act. Inspector Burnham will modify the citation to reflect that the 107(a) imminent danger order has been vacated and rescinde

Respondent's counsel asserted that Inspector Branham is in agreemen with the aforementioned proposed disposition of these cases. After due consideration of the agreed-upon settlement disposition of these cases, including a review of the record and arguments presented by the parties, conclude and find that the proposed disposition is reasonable and warran and it is approved. Accordingly, IT IS ORDERED that:

1. In docket WEVA 82-11-R, the section 104(a) citation citing the contestant with a significant and substantial violation of mandatory safety standard 30 CFR 75.301, is AFFIRMED, and contestants motion to withdraw its contes in this regard is granted.

2. In docket WEVA 82-12-R, the section 107(a) imminent danger order is rescinded and vacated and respondent will modify the citation accordingly.

535 Market St., Philadelphia, PA 19104 (Certified Mail)

ry Palmer, Esq., Consolidation Coal Co., Consol Plaza, 1800 Washington
d., Pittsburgh, PA 15241 (Certified Mail)

FEB 10 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 80-387
C F & I STEEL CORPORATION, Respondent.	A/C No. 05-00296-03040
	MINE: Allen

DECISION AND ORDER

Appearances:

James H. Barkley, Esq., Office of the Solicitor
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294
For the Petitioner

Phillip D. Barber, Esq.
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Petitioner filed a petition for assessment of a civil penalty aga the respondent for alleged violation of 30 C.F.R. 75.1003-2(e), promul by authority of the Federal Mine Safety and Health Act of 1977. The c section states in pertinent part "Electrical contact shall be maintain between the mine track and the frames of off-track mining equipment be moved in-track ... "

Respondent denies that there was a violation of the cited regulat

inspector observed a belt drive and motor weighing between 500 and 700 pounds which had been loaded onto a flatcar being pulled by an electric trolley locomotive.

2. The trolley was powered by a direct current of 250 volts of electricity which passed from the overhead trolley wire through the locomotive and then down through the rail as a return conductor.

3. The flatcar was constructed of steel and the belt drive and motor were mainly constructed of steel. The flatbed surface was 16 to 18 inches above the rails on which it rode. The top of the belt drive and motor was approximately 6 to 8 inches below the trolley wire.

4. The flatcar had an amount of sand and dirt on it, and some of it had been scrapped off in order to mount the belt drive and motor onto the flatcar.

ISSUE

Was electrical contact being maintained between the mine track, the flatcar, and the belt drive and motor while the locomotive was moving the equipment?

DISCUSSION

The MSHA inspector testified that in the event contact is made betwee the bare trolley wire and the metal casing of the belt drive assembly, the equipment would become energized. In order to prevent a miner from receiving an electrical shock from an energized piece of equipment on a flat -car there must be a solid connection of metal-on-metal so that a continuous ground to the rail is provided.

The flatcar surface had some sand and dirt on it, some of which had been scrapped off in order to mount the belt drive on the car. The inspector testified that although the load consisted of metal sitting on metal, a chain of that type is not acceptable as a continuous connection. The load might be "sporadically altered" and with the sand and dirt presen on the flat bed rail car, there was no safe guard from electrical contact to any person who might touch the belt drive when it might be energized.

The cited regulation states, however, that "electrical contact shall be maintained", and the evidence does not show that this was not being done. The inspector testified that he was assuming that with "steel-on-steel between the belt drive and the flatcar, and steel-on-steel between the flatcar and the rails" there was electrical contact. The inspector di not use any means to determine whether there was electrical contact betwee the flatcar and the belt drive and motor when the citation was issued. Th inspector stated that an ohmmeter could be used for that purpose.

contact, there was no evidence that contact was not being maintained time the inspection took place.

The evidence presented leaves me in a position of having to spe as to whether the required electrical contact was or was not present time the citation was issued; or, to speculate further, whether or n electrical contact might be broken if the load became "sporadically altered". The petitioner must show that electrical contact was not, fact, being maintained in order to present a prima facie case. Havi failed to do so, the citation should be vacated.

CONCLUSION OF LAW

1. The undersigned administrative law judge has jurisdiction o parties and subject matter of these proceedings.

2. The petitioner has failed to present a prima facie case sho violation of 30 C.F.R. 75.1003-2(e) as alleged in Citation No. 38836

ORDER

Citation No. 388365 and the civil penalty therefor is VACATED.

Jon D. Boltz
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. YORK 80-101-M A.C. No. 30-00006-05009
v.		
		Ravena Quarry and Plant
ATLANTIC CEMENT COMPANY, INC.,	Respondent	

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Departme of Labor, New York, New York, for Petitioner;
Richard K. Muser, Esq., Clifton, Budd, Burke & DeMaria, New York, New York, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalt under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging violations of mandatory standards. The general issues are whether Atlantic Cement Company, Inc. (Atlantic), has violated the regulations as alleged in the petition filed herein, and, if so, the appropriate civil penalties to be assessed for the violations. A full evidentiary hearing was held with respect to Citation No. 206226. A proposal for settlement was submitted with respect to the remaining citations and was amplified with testimony and documentary evide Petitioner also requested to withdraw one citation (Citation No. 205400) f insufficient evidence and that request was approved on the basis of an adequate proffer by counsel. Petitioner also requested to withdraw its determination that the violations in Citation Nos. 205397 and 205399 were "significant and substantial" as defined in the Act and as interpreted in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 8 (1981). The Secretary proferred sufficient information from which it coul be determined that such withdrawal was appropriate and the request was accordingly approved at hearing. The parties agreed in the proposal for settlement to specific penalty amounts as to the remaining citations and

"[O]penings above, below, or near travelways through which men or mater may fall shall be protected by railings, barriers, or covers." The cit herein specifically alleged in relevant part as follows:

> . . . that the storage area for filters at the top of the steel rack was not provided with a railing or barrier to keep a person from falling over the edge to the concrete floor approximately 9 feet below. The supervisor stated that a person used this area approximately once per week to obtain filters. This steel rack was located in the storage room.

The essential evidence is undisputed and the factual allegations s forth in the citation are not contested. Atlantic contends only that t facts do not support a violation of the cited standard. Alva Shear, an employee of Atlantic for 19 years, admitted that filters and screens we indeed stored on the cited platform. He emphasized however that most o the filters were stored so they could be identified and removed while s ing on a steel safety ladder without the necessity of climbing on to th cited platform itself. Approximately once a week however, it would be necessary for someone to step onto the cited platform to obtain other t of filters. In the 13 years Shear had worked at Atlantic no one had ev fallen off the platform.

The issue here presented is whether this storage platform constitu "travelway" within the meaning of the cited standard. Inasmuch as it i admitted that at least occassionally workmen did in fact walk or travel this platform in order to locate and remove at least some of the filter is clear that those portions of the platform over which the men must tr are "travelways." I am bound by the plain meaning of that term. Since "opening" or drop-off along the edges of the platform were not protecte "railings, barriers, or covers" it is apparent that the violation exist charged.

In determining whether the violation was "significant and substant I must consider whether the violation could be a major cause of a dange safety and health and whether there existed a reasonable likelihood tha hazard contributed to would result in an injury or illness of a reasona serious nature. National Gypsum, supra. The evidence in this case sho that miners could be working on the exposed steel platform some 9 feet a concrete floor as often as once a week. These miners were accordingl exposed with some frequency to a serious hazard. There is little doubt if someone fell from that height to the concrete floor, he could suffer serious if not fatal injuries. Accordingly, I find that the violation was "significant and substantial." For similar reasons, I also find a degree of gravity. The hazard was also obvious but apparently no injur had ever resulted from the condition. I find accordingly that Atlantic

hours per year. Under the circumstances I find that a penalty of $200 is appropriate for this violation.

Partially Contested Citations

Respondent does not dispute that violations existed as charged in Citation Nos. 207687, 207688, 207689, 206227, and 206228, but disputes the "significant and substantial" findings made by the Secretary in connection therewith. Accordingly, evidence was submitted at hearing with respect to that issue.

Citation No. 206227 This citation alleges a violation of the mandatory standard at 30 C.F.R. § 56.9-22 charging that "a berm was not provided for approximately 500 feet along the northeast side of the elevated roadway to the waste dump water pump." The allegations in the citation are not contested. It is undisputed that the height of the roadway varied from 1 to 10 feet and that an ice-covered lake was situated adjacent to the bottom of the slope. It is also undisputed that the roadway was infrequently used, perhaps once a week, by an empty front-end loader having an axle height of approximately 2 to 3 feet and by a pickup truck. At the time of the citation, there also existed on the roadway patches of ice, one as large as 8 feet by 12 feet in size. According to Ed Tompkins, a union representative who accompanied the MSHA inspector, the road in question was used almost exclusively by maintenance pickup trucks travelling at only 5 to 8 miles an hour. A small berm of 6 to 12 inches and clumps of trees along the roadway afforded some protection but the trees were spaced from 10 to 50 feet apart. Within this framework of evidence, I find that indeed injuries would be reasonably likely to occur from the absence of an adequate berm along the cited roadway and that if the injuries were sustained they would be reasonably serious, and possibly fatal to the driver and passengers of a truck or front-end loader falling down the unprotected sections of slope. Under the circumstances, the admitted violation is "significant and substantial" National Gypsum, supra.

Citation No. 206228 This citation charges a violation of the standard at 30 C.F.R. § 56.12-30 and alleges that "the 480-volt exposed leg wires at the waste dust water pump were not enclosed to keep a person from coming in contact with them." The allegations in the citation and the factual representations by MSHA inspector Gary Kettlekamp are not in dispute. Kettlekamp testified that the wires were exposed for several inches. A telephone was located only 6 inches beneath the junction box thereby placing an individual using the telephone in close proximity to the exposed wiring. There was a "danger" sign on the door to the building in which the wires were exposed and the wire was not energized at the time of the citation. Kettlekamp pointed out, however, that whenever the dust pump was in operation the wire would be energized.

however, that contact with the exposed energized wiring could be fatal. Within this framework of evidence, I conclude that there was indeed suff opportunity for exposure to the hazard that injuries would have been rea sonably likely to occur from the violative condition and that if an indi would have contacted the exposed wiring, the injuries would have been re sonably serious and quite possibly fatal. The violation was therefore "significant and substantial."

Citation No. 207687 This citation alleges a violation of the stand at 30 C.F.R. § 56.14-1 charging that the "motor drive coupling (approxim 4 inches in diameter) for the north shale feeder located on the addative of the mill was not provided with a guard." Again the allegations in th citation are undisputed. Moreover, there is no dispute that the exposed coupling at issue was located directly adjacent to a belt crossover and 3 and 1/2 feet off the floor. The evidence shows that an individual wou have to fall to the east side and then extend his arm in order to come i contact with the exposed coupling. The mill helper customarily used the crossover only three times a day.

Within this framework of evidence, I do not find the violation to b "significant and substantial." The possibility of injury was indeed qui remote because of the infrequent use of the catwalk, the distance from t catwalk to the exposed coupling, and the combination of unusual circumst required for exposure to occur.

Citation No. 207688 This citation alleges a violation of the stand at 30 C.F.R. § 56.14-6 charging that "the guard provided for the 12-inch diameter Torus coupling on the slurry pump located in the mill building slurry pumphouse was not in place while the machinery was in operation." allegations in this citation are not disputed. The slurry pump room was 14 feet by 25 feet in size. The exposed area of the coupling was approx mately 12 inches square and was located about 3 feet from the ground. T mill helper was the only employee even working in the vicinity of the ex part and his exposure was limited to a visual examination made some dist from the exposed part only once or twice a shift. Under the circumstanc I do not find that the violation was "significant and substantial." The possibility of exposure of employees to the hazard was extremely limited Injuries were therefore highly unlikely.

Citation No. 207689 This citation alleges a violation of the manda standard at 30 C.F.R. § 56.14-1 charging that "there was no guard provid for either of the two operating sprocket drive motor couplings atop the bucket elevator." The allegations in the citation are not disputed. Th couplings were located about 10 inches from a ladder and an employee was exposed only while greasing the dust bucket. Both couplings were smooth rotated at approximately 400 revolutions per minute. Even though exposu to the hazard was limited to one person--an oiler who climed the ladder

vinced that injuries would have been reasonably likely to occur and tha injury from clothing, tools or a limb contacting the moving couplings c be reasonably serious. Accordingly, the violation is "significant and substantial."

Amount of Penalty

In light of the above findings and the stipulations agreed to by t parties and considering all the criteria under section 110(i) of the Ac I find that the following penalties are appropriate:

Citation No.	Amount of Penalty to be Paid
205397	$150
205399	145
205400 (vacated)	
207687	92
207688	92
206226	200
207689	92
206227	92
206228	122

ORDER

Atlantic Cement Company, Inc., is ORDERED to pay civil penalties c within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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FEB 12 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. CENT 79-60-M
v.	)	A/C No. 41-01849-05002 F
TEXAS INDUSTRIES, INCORPORATED,	)	MINE: Beckett Road Pit and Plant No. 530
Respondent.	)	

Appearances:

Robert A. Fitz, Esq., Office of James E. White, Regional Solicitor, United States Department of Labor, Dallas, Texas
For the Petitioner

W. Kyle Gooch, Esq., Smith, Smith, Dunlap and Canterbury, Dallas, Texas
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Texas Industries, Inc., (TX with a violation of Title 30, Code of Federal Regulations, Section 56.9-5,[1/] a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. Respondent denies that a violation occurred.

After notice to the parties a hearing on the merits was held in Dallas, Texas.

1/ The cited regulation provides as follows:

56.9-5 Mandatory. Operators shall be certain, by signal or other means, that all persons are clear before starting or moving equip-

violation occurred, what penalty, if any, is appropriate.

SUMMARY OF THE EVIDENCE

Donald Clary, in his 18th year, died on the seventh day of his employment with Texas Industries, Inc.

On August 8, 1978, Clary and plant operator Bailey, the only employe in the vicinity, were working at the log washer at the Beckett plant (Tr 9, 40, 78, 79, 96, P2, P7, P9).

As material is dredged from the river it comes into the plant and i split at a scalping screen into waste, sand, and rock fractions. A 36 i McLanahan log washer then removes the clays, silts, and debris. Twin counter paddle shafts, geared to 29 r.p.m., rotate in the log roller. A vertical box screen retains larger sized solids. The screen itself can become clogged and this in turn causes a water overflow. The screen can cleaned by hammering on it on the down stream side of the log washer. Th cleaning procedure does not place a person in a hazardous position (P3, P5, P11, R5, R7, R8).

On the day of the accident operator Bailey told Clary he wanted to clean the screen (Tr. 25). After lunch, about 2:15 p.m., Bailey shut do the machinery. He then showed Clary how to clean the screen (Tr. 26). Bailey then told Clary "I am going back [to the control room] to turn the fedder belt and log washer back on" (Exhibit R9). As he left Bailey saw Clary beating on the screen as he stood on the catwalk (Tr. 36, R9).

The control room portion of this plant is a level above the log wash (Tr. 11, 21, R1, R3). It takes about half a minute, or 25 to 30 seconds, for a worker to go from the catwalk to the control room switches at the upper level (Tr. 22). At the point where the controls are located Baile could not see Clary (Tr. 32, 69, P-7, P-9, R1, R3, R6).

Bailey turned on the machinery. He then walked over to where he co see Clary. He saw him. His body was turning in the log washer. He immediately turned off the power. There was no hope of life (R9).

Clary, feet first into the paddles, was three feet from where he ha been cleaning the screen (Tr. 88).

There was no reason for Clary to be above the tub or the catwalk (T 87, 88, 96). Clary, when hammering on the screen, was standing on the catwalk. There is no direct evidence of the height that the steel side the log washer extends above the catwalk but I estimate the distance at

An MSHA inspector indicated it is routine in the industry to use start up signal with a time interval before activating machinery (Tr. TXI's policy is to sound the alarm signal before the morning start up after a lockout. No lockout procedure occurred here (Tr. 51-52, 94).

DISCUSSION

The evidence here establishes that TXI violated the regulation. obligation under 30 C.F.R. 56.9-5 is to be certain that all persons ar clear before starting equipment. The means suggested by the standard "signal or other means." No signal was given here and the alternative broad umbrella, was neither effective nor could Bailey be "certain" th Clary was clear. I recognize that the death of Clary in and of itself not, by its mere occurrence, prove a violation of the regulation. Lon Star Industries, Inc. 3 FMSHRC 2526 (1981).

Plant operator Bailey did not testify and his evidence is garnere from his oral and written statements made to TXI and MSHA. The direct evidence: "when he started beating the screen off, I told him I was go back to turn the feeder belt and log wash back on. I left him there beating the screen ..." Beating on a screen can often drown out a speaker's words. Did Clary ever acknowledge that he heard Bailey's statement? If he heard the statement what did it mean to him? Would Bailey turn on the machinery 'immediately' or after some interval. Or this was only his seventh day on the job, would Clary anticipate a sta alarm as at the start of the morning shift or after a lock out. Did Clary think there had been a lock out of the equipment? In fact, Clar to be taught how to beat the screen to clear the clogged material. Th could well indicate the machinery had not been previously shut down du Clary's prior six days. This would really leave Clary as an unknowing participant. In short, I cannot be certain that Bailey knew Clary was be clear of the equipment. Certainly is an exactitude demanded by the regulation.

There is credible evidence in this case that the TXI warning horn which could be activated at the control panel, was "barely audible," (28). In its post trial brief TXI argues that an audible warning devic not relevent because TXI relied on" other means." The "other means" consisted of personal notification to be certain that Clary was clear before the operator started the equipment. I agree the defense here d not rely on a signal but relies on personal notification. However, su notification must be as effective as an audible signal. For the reaso previously stated I have found it was not.

No eye witnesses saw Clary die. TXI claims it is highly probable his death resulted after the log washer was started when Clary took a

a piece of wire screening (See Exhibit P-5). As he did the machine started and pulled him in. As he tried to extricate himself his feet became entangled.

I recognize that it is uncontroverted that Clary received a safety booklet when he started to work with TXI (RIO). He further received 24 hours of safety instructions and he was specifically told not to go above the catwalk (Tr. 96). However, the gravamen of this case centers on the failure of the plant operator to comply with the regulation before starting the machinery. Any contributory negligence by Clary is not determinative of whether TXI violated the regulation.

For the above reasons I conclude that TXI violated 30 C.F.R. 56.9-5.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In connection with the statutory criteria I note that TXI operates 122 plants in seven states. At the Beckett Road Pit and Plant it mines sand and gravel from the river bottom by dragline (Tr. 49, 62, P-11). All TXI employees worked approximately 855,879 man hours in 1978. The employees at the Beckett Road Pit and Plant worked 27,166 man hours. (Stipulation) TXI is accordingly a large operator.

TXI has no prior adverse history but I find TXI was highly negligent in that it did not use an alarm as is the industry practice but instead relied on the more hazardous approach of "personal notification." The gravity was apparent resulting in the death of worker Clary. After the citation was issued TXI complied by installing an audible alarm. The alarm could be heard above the operating equipment (Tr. 57).

On balance, and considering the statute, I am unwilling to disturb the proposed civil penalty of $3,000.

ORDER

Citation 156111 and proposed civil penalty are affirmed.

John J. Morris
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: LAKE 81-87-M A.O. No: 21-00089-05002
v.	:	Hader Quarry and Mill
VALLEY LIMESTONE COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, Illinois 60604, for Petitioner

Lloyd H. Johnson, Sr., Valley Limestone Company, Box 127, Zumbrota, Minnesota 55992, appeared pro se

By: Charles C. Moore, Jr., Administrative Law Judge

The above-captioned civil penalty case was tried before Judge John Cook on August 25, 1981 in Minneapolis, Minnesota. Judge Cook has since transferred from the Federal Mine Safety and Health Review Commission and the case has been assigned to me. The parties were advised of Judge Cook's transfer on January 19, 1982. They have not suggested any rehearing or further evidentiary proceeding. I hold and by their actions that the parties have waived any right to now object to a decision based on the record made before Judge Cook.

On August 29, 1978 Citation No: 289667 was issued to Valley Limestone Company, a trade name used by Lloyd H. Johnston, alleging a violation of 36 CFR. 56.9-37. See Exhibit M5. The citation charges:

> The Chevrolet 6400 series haul truck was left unattended without setting the brakes at the grizzly dump site and at pit while being loaded.

The standard in question requires that "mobile equipment shall not be left unattended unless the brakes are set . . ." If the statements set forth in the citation are true and if respondent is subject to the coverage of the Federal Mine Safety and Health Act of 1977, then a

I had similar motions before me in Secretary of Labor v. Capitol Aggregates, Inc., Docket No: DENV 79-163-PM and DENV 79-240-PM. 2 FM 869, 870 (1980). That case involves a cement plant but insofar as coverage of the Act is concerned it is quite similar to the instant case. As to the motions to dismiss filed because of alleged lack of coverage in Capitol Aggregates, Inc., I stated:

> Both motions were denied pricipally on the rationale of Wickard Filburn, 317 U.S. 111 (1942). The case involved home grown whe which was used for the grower's own consumption and the court s at page 91 "but if we assume that it is never marketed, it supp a need of the man who grew it which would otherwise be reflecte purchases in the open market. Home grown wheat in this sense competes with wheat in commerce." Subsequent cases have held t Respondent's activities need not be considered alone in order t measure their effect on commerce but may be combined with other engaged in similar activities.
>
> > Even activity that is purely intrastate in character be regulated by Congress, where the activity, combined wit like conduct by others similarly situated, affects commerc among the States or with foreign nations. See Heart of Atl Motel, Inc. v. U.S. 379 241, 255 (1964); Wickard v. Filbur 317 U.S.111, 127-128 (1942). [Fry v. U.S., 421 U.S. 542 at (1974).]

For the reasons set forth above, I hold that Respondent's opera is covered by the Mine Safety and Health Act.

When Inspector Tarro came to the quarry on August 29, 1978, he observed two trucks and a front-end loader engaged in transporting t limestone to the crusher. The driver would take a load of limestone the crusher in one truck, then he would return and leave that empty truck to be loaded while he drove the other truck to the crusher. W the inspector saw the driver leave the truck subject to the citation herein to be loaded, and get in the other truck and drive away, he s the first truck roll about 50 feet just before the loader dumped any limestone in. When he questioned the front end loader operator and examined the truck he found that there was no handbrake and that the reason the truck had not been left in gear with the motor off, was t it couldn't be started without being pushed. It was constantly left running. While Respondent asserts that the truck did not roll 50 or feet, maybe only a few feet, he does not deny that the truck was lef idling with no brakes set. The violation clearly occurred.

had not been abated and there was no reason for an extension of time. While that order is not before me for review, the propriety of its issuance has a bearing on the good faith effort to abate the violation If the charge had been made that the truck did not have adequate brake the order would be clearly justified. Mere failure to use the equipmen would not constitute abatement. But the charge here was leaving the truck unattended without setting the brakes and ordinarily when a viol is caused by some affirmative act on the part of a miner, abatement is accomplished by instructing all miners not to do whatever it was that the offending miner did. Such an instruction would have been of no value in the instant case because there were no brakes to be set. Goo faith compliance would have been to repair the brakes immediately and instruct the driver never to leave the truck unattended without settin the brakes. Respondent did not do that in this case. While Mr. Johns testified that he did not use the truck he was vague as to the time after which he did not use it. He did not seem to be able to distingu between the original citation and the order that was issued two weeks later. After one of those times he did not use the truck, but the truc was in the quarry when the order was issued. Under the circumstances do not find good faith abatement even though I am not sure the order w technically proper.

The gravity of this violation is very high. Even if there were n mining laws, common sense would dictate that you do not leave a vehicl idling without some means of preventing it from rolling, either blocki it or braking it, or shutting off the engine and putting it in gear. this very mine, in 1973, a fatality was caused by a truck failing to have an emergency brake, and it may have been this same truck. This prior fatal accident does not go to the Respondent's history of violat because the Act under which this proceeding was brought was not in effect at that time but the evidence does show that Respondent was wel aware of the hazards involved in a failure to have emergency brakes.

If the brakes had been working on the truck and the truck driver had failed to set them I would impute the negligence of the driver to the operator in considering the amount of the penalty to be assessed. Here, however, the truck driver did not have a brake to set and becaus of the condition of the truck he could not stop the engine and leave i parked in gear. I consider it gross negligence for Respondent to allo this piece of equipment in this condition to be used in mine operation

While Mr. Johnston complains that he was being harrassed by the inspector, I think the inspector was being lenient in giving him two weeks to abate a violation of this type. Another inspector might have issued an imminent danger order and required that the quarry be shut down until the truck was either repaired or taken out of service.

challenges a citation in an administrative proceeding, and ends up assessed a penalty higher than that determined by the assessment of he feels that he is being punished for having forced the government go to trial in the matter. That is a false impression, however. T fact is that after examining the evidence in a case, the judge ofte much more information concerning the violation than was available t assessment officer at the assessment stage of the proceedings. The evidence in the instant case and the circumstances surrounding the violation convinces me that a $700 penalty would be appropriate.

Respondent is therefore ordered to pay to MSHA, within 30 days civil penalty in the amount of $700.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Entered:

Distribution: By Certified Mail

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 81-46
	:	A.C. No. 36-06018-03030
v.	:	
	:	Emilie No. 4 Mine
KEYSTONE COAL MINING CORPORATION, Respondent	:	

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., Office of the Solicitor,
Department of Labor, for Petitioner;
Bartley R. Simeral, Esq., Keystone Coal Mining Corporat
Indiana, Pennsylvania.

Before: Judge Charles C. Moore, Jr.

Respondent is charged with five separate violations (citations) o
30 C.F.R. § 75.1103-4(a) which provides: "Automatic fire sensor and w
device systems shall provide identification of fire within each belt f
(each belt unit operated by a belt drive)." Respondent's belt system
sists of five flights designated as No. 1 Main, No. 1 North, No. 2 Con
No. 3 North, and No. 1 Right. No. 1 Main is the most outby belt fligh
the sensor on that flight is the one that Inspector Lawson and several
inspectors first tested when they conducted a blitz inspection on
September 30, 1980. Inspector Lawson stayed in the lamphouse where th
alarm and monitor were located while the other inspectors went undergr
to assist in the testing procedure. The remote locators are, in essen
variable resistors located in each of the drive units of the five belt
flights. The remote indicators are connected with heat-sensing elemen
along their respective belt flights and if a heat-sensing element is a
vated, it has the effect of shorting out the system just inby the resi
of the remote indicator on that particular belt flight. When the remo
indicator is thus shorted out, a belt rings and an electronic readout
lampshack on the surface shows a number that is supposed to indicate t
particular flight where the fire is located. The indicator in the lam

works by totaling up these resistances. Each remote locator is affixed with a testing key or switch which shorts out the wires inby the resistors, thus having the same effect as if one of the heat sensors had shorted out the wires.

The system was supposed to be adjusted so that if the test key on the remote locator for No. 1 Main was turned, the indication in the lamphouse should have been between 1 and 4. When it was turned during Mr. Lawson's test, it registered 18. The figures 18 does not correspond with any of the designed readouts for the five belts. The readout for No. 2 conveyor should be between 4 and 6, the readout for No. 3 North should be between 8 and 10, the readout for No. 1 North should be between 10 and 12, and the readout for No. 1 Right should be between 12 and 14. A reading of 18 indicates that there is a fire but does not indicate where the fire is located.

Inspector Lawson wrote Citation No. 842716 for the erroneous readout at No. 1 Main. He then tested No. 1 Right but the remote locator test key was inoperable at that location. The remote locator was replaced and in its uncalibrated state gave a reading of 9.2. This reading would have been impossible if the remote locator in No. 1 Main was still reading 18. The resistances are additive and regardless of how this replaced remote locator was calibrated, the readout in the lamphouse would have to be more than the resistance being created at No. 1 Main. The explanation is that one of Respondent's technicians was at the No. 1 Main locator trying to calibrate it for the correct reading of between 1 and 4 while the rest of the tests were being made, or at least while some of them were being made because some of the tests were made after No. 1 remote locator had been properly calibrated. Citation No. 842717 was written because of the faulty test key switch. The section cited, however, does not requre a test key and the fact that a test key is not working does not keep the remote locator from working. (TR 100)*/

The next test was made at No. 3 North and the indication there was 10. which would indicate a fire in No. 1 North rather than No. 3 North. Citation No. 8428718 was written for this condition.

The next test was made on the No. 2 Conveyor remote locator and the reading was 1.8 which would indicate a fire on the No. 1 Main belt. Citation No. 842719 was written for this condition. Citation No. 842720 was written because the indication on the remote locator in No. 1 North was 18.9 which, as in the case with the original readout on the No. 1 Main remote locator, would indicate a fire but would not indicate its location within the belt

30 a.m., the second at 8:45. the
and the fifth at 9:30. Inspector

the readout to its proper value. He stayed at that position until the proper calibration had been made and then went to the No. 2 Conveyor where the fourth citation was issued, No. 842719, at 9:15. There is a discrepancy in the times because the citation for No. 1 Main was supposedly abated as soon as it came into adjustment and that was not until 9:30. Inspector Seibert could not have remained in No. 1 Main until 9:30 and have also been in No. 2 Conveyor at 9:15 even though the two remote locators for these flights are fairly close. On Respondent's Exhibit No. 1, the arrows depict the positions of the remote locators and the orange lines show the five flights of belts involved in this case.

Respondent's Exhibit No. 5 is an MSHA policy statement which to me indicates that the policy is to issue only one citation on this system if it is out of adjustment. Both inspectors, however, interpreted the policy statement as requiring a citation for each flight that was out of adjustment. I see no need to rule on these contentions because I am convinced that once the technician started readjusting the resistance on the remote indicator of No. 1 Main, it invalidated all of the readings on the other remote locators. It is a system of adding resistances and all of the remote locators inby No. 1 Main were affected by the adjustment of the locator in No. 1 Main. It is not clear to what extent the other locators were adjusted between the time of the first citation at 8:30 and the time of the last at 9:30. But it is clear, for example, that the remote locator on No. 1 Right, if tested should indicate its own resistance plus the resistance of the remote locator on No. 2 Conveyor and the remote locator on No. 1 Main. If there is a recalibration of any remote locator outby the one being tested, it destroys the validity of the test.

I therefore find that the citation issued for the No. 1 Main remote locator, Citation No. 842716 was valid but that all of the others were invalidated when the tests were improperly conducted. The four citations indicated are thus vacated.

I find the violation at No. 1 Main did occur. The inspector testified that the negligence was of a low order and there is no dispute as to the other criteria involved. A penalty of $200 is assessed.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty of $200.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Bartley R. Simeral, Esq., Keystone Coal Mining Corporation, 655 Church Street, Indiana, PA 15701 (Certified Mail)

DENVER, COLORADO 80204

FEB 17 1982

CRETARY OF LABOR, MINE SAFETY AND ALTH ADMINISTRATION (MSHA), on half of KENNETH E. BUSH,	)	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
Complainant,	)	DOCKET NO. WEST 81-115-DM
v.	)	MD 80-152
ION CARBIDE CORPORATION,	)	
Respondent.	)	

DECISION AND ORDER

pearances:

mes H. Barkley, Esq.
fice of the Solicitor
ited States Department of Labor
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nver, Colorado 80294
For the Complainant

hn W. Whittlesey, Esq.
ion Carbide Corporation
w Department
0 Park Avenue
w York, New York 10017
For the Respondent

fore: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Secretary, on behalf of Kenneth E. Bush, filed a complaint against e respondent alleging that on or about July 25, 1980, respondent dis- arged Bush contrary to Section 105(c)(1)[1] of the Federal Mine Safety d Health Act of 1977 (hereinafter the "Act") for exercising his statutory ghts under the Act.

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[1] Section 105(c)(1) reads in pertinent part "No person shall discharge ...

Additionally, respondent denies that there is jurisdiction of the Act these proceedings.

At the commencement of the hearing, respondent moved to dismiss proceedings on the following grounds: (1) that procedural rule 41 2/ requires that prior to the issuance of a discrimination complaint the Secretary must file a written determination of violations and that t complaint must be filed within 30 days of that determination. Since such written determination was served on the respondent, there was n jurisdiction to issue the complaint; and (2) that MSHA has no jurisd over respondent's facility because it is not a "mine" within the mea the Act.

FINDINGS OF FACT

1. At all times relevent to these proceedings, respondent oper facility for processing vanadium. The facility is hereinafter refer as the "Rifle Plant".

2. Vanadium is contained in an ore that is mined or extracted the ground. After the vanadium ore is processed at another location respondent's Rifle Plant receives the vanadium in a concentrated liq solution shipped in by truck.

3. At the Rifle Plant the concentrated liquid solution is made several finished products, including modified vanadium oxide.

4. For several years prior to July 1980, sulfuric acid arrived Rifle Plant by railroad tank car, and the acid was unloaded from the road tank cars into storage tanks. In July, 1980, it became necessa change the procedure so as to off load sulfuric acid from tank cars tank trucks and from tank trucks into storage tanks. It was also ne to load the acid from storage tanks into tank trucks.

5. After the railroad tank car arrives at the plant, the acid removed by means of compressed air piped into the tank cars which fo

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2/ Section 2700.41 When to file.

(a) The Secretary. A complaint of discharge, discrimination or interference shall be filed by the Secretary within 30 days after hi written determination that a violation has occurred.

"blow back" when the tank car empties all the acid into the truck, and th air is still being blown into the man hole on top of the truck. The "blo back" causes acid to spray out of the manhole.

7. Complainant was a heavy duty auto mechanic employed for about fi years as such by respondent at the rifle plant. As part of complainant's duties he was asked by a supervisor in July, 1980, to participate and lea the procedure for unloading sulfuric acid.

8. The first sulfuric acid was loaded onto trucks on July 21, 1980. The complainant complained to a supervisor that there was a lack of valve in the procedure for unloading the acid, there were some leaks of acid, t air pressure regulator was working improperly, and that there was possibl "blow back" of acid from the truck.

9. On July 22, 1980, there were two leaks of acid in the line to th tank truck and both leaks were fixed. On the same date the acid "blow back" problem was rectified by leaving an amount of acid in the railroad tank car so that air pressure would not blow into the truck unless it was forcing acid into the manhole. This would prevent the acid from blowing back on the workers.

10. On July 22, 1980, complainant was to participate in "breaking in or learning to unload the acid from trucks coming in, but he informed the mine maintenance foreman that he was not going to do it, that it was unsa and it always had been, and, besides, it was not his job.

11. On July 23, 1980, an employee of the respondent had received an "acid splash" while in the process of unloading acid.

12. On July 23, 1980, at the office of complainant's supervisor, complainant was asked what the safety hazards were in regard to unloading acid. Complainant mentioned several problems and complainant's superviso discussed each one as having been taken care of already. The supervisor then asked complainant to unload acid, but complainant refused stating th it was unsafe, and it was not his job. Complainant did not state as to what was now unsafe in regard to unloading the acid.

13. On July 24, 1980, complainant was again asked by his supervisor continue "breaking in" on the acid unloading work with another employee. Complainant said he would go to the area and observe, but that he would n do anything further. The plant manager, who was standing nearby, then to complainant that complainant was suspended for failure to do his job.

complainant and ordered him to leave. Confronting the plant manager as complainant was leaving, complainant stated, "You mousey little bastard, ought to break your fucking nose." After other comments were exchanged, complainant left the property.

14. Complainant received a letter on July 25, 1980, instructing hi that his employment with respondent was terminated, because of insubordination, refusal to carry out work assignments, and for making threatening and derogatory remarks and gestures toward the plant superintendent.

ISSUES

1. Did the Commission lose jurisdiction of this case if the Secret failed to file a written determination that a violation occurred and did not serve it on respondent within 30 days before the discrimination complaint was filed?

2. Does the Act give the Commission jurisdiction over a plant that does nothing more than process vanadium which is received at the plant i concentrated liquid solution form?

3. Did respondent violate Section 105(c)(1) of the Act when respondent terminated complainant's employment on July 25, 1980?

DISCUSSION

Respondent asserts that a condition precedent to the filing of a discrimination complaint by the Secretary is that a written determinatio that a violation occurred must be made by the Secretary. Respondent assumes that since no such written determination was served on the respondent, the condition precedent had not been followed and, therefore there was no jurisdiction to issue the complaint.

The respondent overlooks the fact that procedural rule 41 does not state that the written determination must be served on the respondent. Indeed, the rule is silent as to what, if anything, is to be done with t written determination. In any event, the requirement that the Secretary file the complaint within 30 days of the written determination is for th benefit of the miner on whose behalf the Secretary is to file a complain This provision in the rule acts to insure that the Secretary take prompt action in filing the complaint. Therefore, I find no merit in responden argument.

definition of a "mine". Respondent argues that the facility is merely a chemical processing plant and not a "coal or other mine" as defined in Section 3(h)(1) of the Act.

Although the vanadium processed at the rifle plant arrives in a concentrated liquid solution which is shipped in by truck, it is undisputed that vanadium comes from ore which is mined or extracted from the ground. It is also undisputed that vanadium is a mineral. Section 3(h)(1) states in pertinent part as follows:

> "Coal or other mine" means ... (C) ... facilities, equipment, machines, tools, or other property ... used in ... the work of preparing ... other minerals ...

The definition is broad enough to include the operations of the Rifle Plant. Vanadium is a mineral and the facilities at the plant are used in the work of preparing the mineral into several saleable products including vanadium oxide. Accordingly, I find that the rifle plant is a "mine" according to the definition contained in the Act, and that the Commission has jurisdiction over the parties and subject matter of these proceedings.

The principles to be followed in deciding the remaining issues in this case are those set forth in two leading cases: Secretary of Labor, on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) and Secretary of Labor, Mine Safety and Health Administration (MSHA), ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Thus, the following questions must be answered in order to determine whether or not the respondent violated section 105(c)(1) of the Act when it fired the complainant.

1. Did complainant engaged in protected activity?

2. If so, was the firing of the complainant motivated in any part by the protected activity?

3. If complainant was engaged in protected activity and respondent fired complainant partially because of that protected activity, was respondent also motivated to fire complainant because of any unprotected activity of the complainant?

4. Would respondent have fired complainant in any event because of unprotected activity?

5. In refusing to unload acid, did complainant have a good faith reasonable belief in a hazardous condition and, if so, was complainant's honest perception a reasonable one under the circumstances of this case?

24, 1980, the day complainant was suspended. A safety complaint involving a condition adjudged by the miner to be unsafe constitutes conduct protected by the Act.

Since complainant did engage in protected activity, the next question is whether the firing of complainant was motivated in part by the protected activity. In order to answer this question, it is only necessary to restate the wording contained in the letter dated July 25, 1980, from respondent directed to complainant informing him that he was terminated effective immediately for the "totality of your conduct on Thursday July 24, 1980, including insubordination, refusal to carry out work assignments, and for making threatening and derogatory remarks and gestures toward me [plant superintendent]."

The letter states that part of the reason for complainant's termination was he refusal to carry out work assignments. The work assignments in question was the assignment to continue "breaking in" on the work of unloading sulfuric acid. Complainant was referring to this assignment when he stated that the work was unsafe and not his job. I conclude that the firing of complainant was motivated in part by complainant's protected activity.

Respondent was also motivated to fire complainant because of complainant's unprotected activity. Again, referring to respondent's letter to complainant dated July 25, 1980, respondent cites insubordination, and making threatening and derogatory remarks and jestures toward the plant superintendent as additional reasons for complainant's termination of employment. These activities were not protected by the Act and according to respondent's letter, they were part of the reason for complainant's termination.

The evidence does not support a conclusion that respondent would have fired complainant in any event because of unprotected activity. Respondent argues that complainant would only have been suspended for refusing to unload acid but was fired only for reasons unprotected by the Act, namely, for his abusive treatment of the plant superintendent. However, both respondent's letter of July 25, 1980, and the testimony of the plant superintendent contradict that assertion. The letter mentions complainant's refusal to carry out work assignment as a ground for termination. The plant superintendent against whom complainant made the abusive remarks testified that "we will not do anything in the heat of an incident other than to suspend."

In refusing to continue to "break in" on the work of unloading the acid on the basis that it was unsafe, complainant's percention was not a reasonable one under the circumstances of this case. In addition to stating to his supervisors several times that the work was unsafe, com-

been acted upon by the respondent. The problems including blow back of acid while loading the trucks, and the problem of acid leaks while disconnecting lines had been rectified.

After the solution of all the complaints had been explained to complainant in his supervisor's office on July 24, 1980, complainant was again asked to break in on the work of unloading the acid. Complainant again refused, stating that it was unsafe, but when he was asked in what way it was unsafe, complainant offerred no explanation. Complainant also stated, as he had before, that "besides, its not my job." The only conclusion I can come to is that complainant would not unload acid under any circumstances. The evidence left no doubt that unloading acid is a dangerous job, but when all precautions have been taken, it does not mean that an employee may safely refuse to do the work under the protection of the Act.

Under the circumstances of this case complainant's refusal to work in unloading acid cannot be considered reasonable.

CONCLUSION OF LAW

Complainant has failed to prove by preponderance of the evidence that respondent violated section 105(c)(1) of the Act when it discharged complainant on July 25, 1980.

ORDER

The complaint is dismissed.

Jon D. Boltz
Administrative Law Judge

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22 FEB 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
v.	)	DOCKET NO. WEST 79-405
THE PITTSBURGH & MIDWAY COAL COMPANY, Respondent.	)	MSHA CASE NO. 05-00303-03005
	)	MINE: Edna Strip

Appearances:

Katherine Vigil, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado
For the Petitioner

Terrance M. Cullen, Esq.
Denver, Colorado
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges that respondent, The Pittsburgh and Coal Mining Co., (P & M), violated Title 30, Code of Federal Regulat § 77.1110, 1/ a regulation adopted under the authority of the Feder Mine Safety and Health Act, 30 U.S.C. 801 et seq.

1/ The cited standard provides as follows:

77.1110 Examination and maintenance of firefighting equipment.

occurred, what penalty, if any, is appropriate.

STIPULATED FACTS

The parties waived a hearing and filed the following written stipulation:

1. Respondent operates a surface coal mine at Oak Creek, Colorado, called the Edna Strip Mine;

2. The operation of the Edna Strip Mine affects commerce and is thus subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (the "1977 Act").

3. That this proceeding is properly before the Honorable John J. Morris.

4. An authorized representative of the Secretary of Labor conducted an inspection of the Edna Strip Mine on June 12, 1979, in order to determine respondent's compliance with the 1977 Act and valid regulations promulgated by the Secretary of Labor pursuant to the 1977 Act.

5. As part of that inspection, the authorized representative of the Secretary discovered a damaged fire extinguisher on an explosives truck of the respondent. This fire extinguisher was inoperative on the day of the inspection because of a damaged release lever. As a result, the authorized representative of the Secretary of Labor issued Citation No. 791622 to the respondent, which citation alleges that respondent's damaged fire extinguisher constitutes a violation of 30 C.F.R. § 77.1110 by the respondent. The respondent does not dispute the existence of an inoperative fire extinguisher on the explosives truck.

6. The authorized representative of the Secretary did not allege that respondent had violated 30 C.F.R. § 77.1109 despite the presence of the inoperative fire extinguisher on the respondent's explosives truck.

7. On June 12, 1979, there were two operative type ABC fire extinguishers with a combined rated extinguishing capacity of 15 BC on the cited vehicle, one 10 BC and one 5 BC. Thus, respondent states it was in compliance with 30 C.F.R. § 77.1109(f) on the day Citation No. 791622 was issued.

8. The damage to the inoperative fire extinguisher for which Citation No. 791622 was issued was not obvious during the daily inspections of the cited vehicle. In addition, the permanent tag attached to the cited fire extinguisher indicated that it had been completely examined by the

violated 30 C.F.R. § 77.1110. The regulation provides that fire fighti equipment shall be usable and operative. A fire extinguisher on the explosives truck on the day of this inspection was inoperative and consequently unusable. The extinguisher had a broken release lever.

P & M's defense evolves in this fashion: Section 77.1110 states th "firefighting equipment shall be continuously maintained ...". 30 C.F. 1109(f) 2/ relating to the quantity and location of fire fighting equipment states that vehicles shall be equipped in accordance with the National Fire Protection Association Handbook, 12th Edition 1962. The parties and their post trial briefs agree that P & M was in compliance 30 C.F.R. § 77.1109(f) on the day the citation was issued.

I am not persuaded by P & M's argument. Section 77.1110 in effect states that [all] firefighting equipment shall be continuously maintain in a usable and operative condition. Section 77.1109(f) establishes th minimum quantity of such fire fighting equipment. If P & M places a quantity in excess of the minimum such fire extinguishers must neverthe be usable and operative. This view necessarily conflicts with P & M's contention that a violation cannot be based on the existence of an inoperative fire extinguisher where the explosives truck also has opera fire equipment meeting or exceeding the requirement of 30 C.F.R. § 77.- 1109(f).

I agree with P & M's view that it need only meet the minimum requi ments of two fire extinguisher required by 30 C.F.R. 77.1109(f); howeve having undertaken to provide more equipment, it must be usable and operative.

P & M states the Secretary's view is unreasonable because under hi construction a fire extinguisher which is awaiting or being repaired co be in violation of the regulation. I disagree. A fire extinguisher awaiting repair seems hardly by any stretch of the imagination to be "f fighting" equipment. In any event P & M has not presented those facts adjudication.

2/ The standard, 30 C.F.R. 1109(f), referred to by P & M reads as foll

(f) Vehicles transporting explosives and blasting agents shall be equipped with fire protection as recommended in Code 495, section 20, National Fire Protection Association Handbook, 12th Edition, 1962.

would require the miner to guess which two of the three extinguishers wo operative. There are no doubt situations in a fire when a miner would n have a wealth of time to make his choice. Further, P & M's argument lea me to extend it. Consider the hazards if only two extinguishers out of total of, say six extinguishers, were operative. The law is clear that a conflict exists between an interpretation that promotes safety and an interpretation that would serve another purpose at the possible compromi of safety the first should be preferred U.M.W.A. v. Kleppe 562 F. 2d 126 1265 (D.C. Cir. 1977).

CIVIL PENALTY

P & M, in the alternative, argues that the $114 proposed civil pena is excessive. This view rests on the proposition that the fire extinguisher damage was not obvious and that the extinguisher had been examined within the six months preceding the date of the inspection. Th issue goes to P & M's negligence which I consider higher than usual inasmuch as this was an explosives truck.

P & M further notes it immediately complied and abated the violatio and it also reargues its view that no safety problem existed. Abatement a factor favorable to P & M.

Section 110(i) 30 U.S.C. 820(i) sets forth the criteria for assessi civil penalties and on the basis of the stipulated facts and the statute deem that the proposed civil penalty of $114 is appropriate.

Based on the foregoing facts and conclusions of law I enter the following:

ORDER

Citation 791622 and the proposed civil penalty therefor are affirme

John J. Morris
Administrative Law Judge

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DENVER, COLORADO 80204

2 2 FEB 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. FMC CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-80-M MSHA CASE NO. 48-00152-0503 MINE: FMC
FMC CORPORATION, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION PROCEED DOCKET NO. WEST 80-397-RM Citation No. 337613 MINE: FMC

DECISION AND ORDER

Appearances:

James R. Cato, Esq.
Office of the Solicitor
United States Department of Labor
911 Walnut Street, Room 2106
Kansas City, Missouri 64016
Attorney for the Secretary

John A. Snow, Esq.
VanCott, Bagley, Cornwall & McCarthy
50 S. Main, Suite 1600
Salt Lake City, Utah 84144
Attorney for FMC Corporation

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Pursuant to provisions of section 105(d) of the Federal Mine Saf and Health Act of 1977 (hereinafter the "Act"), FMC Corporation

the same citation. An order was entered consolidating the above cases f
hearing. The parties agreed that I have jurisdiction over the parties a
subject matter of these proceedings.

FINDINGS OF FACT

1. FMC is a large operator, and the imposition of a proposed civil penalty will not affect FMC's ability to continue in business.

2. FMC's history of previous violations is not extraordinary with respect to other mines of similar size.

3. FMC demonstrated good faith in abating the alleged violation af notification.

4. It is the procedure at FMC's underground Trona Mine that the standard pattern used for drilling and blasting is to commence work on t right side of a room and then move to the left. Thus, the driller might drill the right crosscut of a room, then left to the face, and then move the left side of the room and drill the left crosscut.

5. After the driller completes his work in a room, the blaster (shot fire) follows and would prepare the right crosscut, the face, and then the left crosscut, in that order, for blasting.

6. The blaster inserts the primer in the drill holes and then the holes are tamped with explosive agent. The wiring of the holes is then completed in order to be ready for firing.

7. On June 10, 1980, Billy Smith, a blaster, was assigned to load blast in rooms 4 and 5 after they were drilled on the same date. In roo only the face and left crosscut were to be drilled and blasted, but in r 5, the right crosscut, face and left crosscut were to be prepared for blasting.

8. It took Smith approximately 20 to 30 minutes to prepare a face crosscut for blasting, and it took approximately 10 to 20 minutes for th driller to drill a face or crosscut.

9. After the driller completed drilling the face and left crosscut room 4 he moved into room 5 and began drilling the right crosscut. On t opposite side of the right crosscut of room 5 was the left crosscut of r 4.

10. Immediately following the drillers withdrawal from room 4, Smit entered the room and loaded the drill holes at the face with primer, but instead of completing the operation by inserting the explosives, tamping

4. The driller and blaster were then working on the opposite sides of same wall.

12. While the driller was drilling the last hole in the right cro cut of room 5, the drill intersected a charged hole in the left crosscu room 4, resulting in an explosion which fatally injured Smith.

13. According to FMC drilling procedures, " ... the drill operato must make sure of the location to be drilled to insure that he will not drill into places that are already tamped or being tamped with explosives."

ISSUES

Was there a violation of 30 C.F.R. 57.6-107 on June 10, 1980, and, so, what is the appropriate penalty?

DISCUSSION

Smith failed to follow FMC procedures in that he did not finish preparing the face of room 4 for blasting before he moved on to the lef crosscut. Smith's supervisor told him a short time before the accident check in room 5 to make sure the driller was finished before he charged left crosscut of room 4. It was also the duty of the driller to ensure that he would not drill into places that were "already tamped or being tamped with explosives." These acts or omissions caused the drill to intersect the previously drilled and charged hole.

FMC argues that there was no violation of the cited regulation bec drilling was not occurring where there was a danger of intersecting a charged hole, and that the only reason a charged hole was intersected w due to the negligence of Smith. In other words, the standard merely prohibits an operator from drilling in an area where there is a reason know that there is a possibility or a danger of intersecting a charged hole. Since there was no reason for FMC or the driller to know that Sm would not be following the prescribed procedures, there was no reason t believe that the driller would intersect a charged hole.

This argument overlooks the fact that the driller also did not com with FMC's own drill operator requirements. According to one rule, the drill operator must ensure that he will not drill into places that are already tamped or being tamped with explosives. The drill operator fai to do this.

There was danger of intersecting a charged hole because both the d operator and blaster were working in adjacent rooms. This condition al created the danger, and, thus required that steps be taken to ensure th

intersecting a charged hole, the hole should not have been drilled, according to the cited regulation. Thus, I find that there was a vi of 30 C.F.R. 57.6-107, as alleged.

I find that the proximate cause of the violation was the failur the blaster and the drill operator to follow supervisors instructior FMC's specific work rules. However, the Act imposes strict liabilit the mine operator in cases where employee misconduct has caused a vi of a regulation. Citation Heldenfells Brothers, Inc., v. Marshall a FMSHRC, 2 MSHC 1107 (5th Cir. 1981). Lack of negligence on the part acts to mitigate the proposed civil penalty.

CONCLUSION OF LAW

The Secretary has proven by a preponderance of the evidence tha violated 30 C.F.R. 57.6-107, as alleged in Citation 337613.

ORDER

Citation No. 337613 is affirmed, the Notice of Contest is dismi and FMC is ordered to pay a civil penalty in the sum of $500.00 with days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

Distribution:

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FEB 23 1982

RETARY OF LABOR, : Civil Penalty Proceeding
INE SAFETY AND HEALTH
DMINISTRATION (MSHA),
Petitioner : Docket No. KENT 81-140

v. : A. C. No. 15-11161-03043D

TUCKY CARBON CORPORATION,
Respondent : Calloway No. 1 Mine

DECISION APPROVING SETTLEMENT

The parties have reached a settlement of the violation involved in total sum of $1,000.00. MSHA's initial assessment therefor was 000.00. In their joint motion the parties indicate:

"The parties, by counsel, after lengthy discussions of the criteria forth within section 110(i) of the Act and a review of the trial ord (Docket No. KENT 80-145-D) consisting of 653 pages, have agreed the pending matter should be settled for $1,000.

The following is a discussion of the section 110(i) criteria.

1. Negligence - The violation resulted from a low degree of ordinary ligence. This conclusion is based upon the following considerations:

a. The failure of Gooslin, the discriminatee, to timely notify Kentucky Carbon of his intentions to make a safety inspection on the night of September 30, 1979.

b. Gooslin's unprotected activity, i.e., "On September 30, 1979, complainant Bobby Gooslin engaged in the following activity which does not constitute protected activity under section 105(c) of the Act: After being refused the right to enter and inspect the mine by Shift Foreman James Christian, Gooslin said, 'I'm going to show these damn Hagers that they don't run this place.'" Secretary of Labor, on behalf of Bobby Gooslin v. Kentucky Carbon Corporation, Docket No. KENT 80-145-D (FMSHRC, March 18, 1981), page 24.

c. The comment made by Administrative Law Judge Laurenson in the original Gooslin case at page 15: "The UMWA and Kentucky Carbon were

to discharge any miner involved in any unauthorized work stoppage.

4. The discharge and subsequent reinstatement of thirteen miners who invoked their individual rights pursuant to the wage agreement, by refusing to work in an area which they considered unsafe.

5. A continuing dispute between UMWA and Kentucky Carbon regarding the requirement of a twenty-four hour notice before making a safety committee inspection.

6. The UMWA and Kentucky Carbon dispute involving MSHA in dealing with the propriety of hauling supplies on mantrips.

2. Gravity - This violation could have a future effect upon miners who desire to assert rights protected by section 105(c) of the Act. However, the parties believe that the gravity of this matter has been negated by the decision in the discrimination proceeding heretofore mentioned.

3. Good Faith - Good faith in the traditional sense is not applicable to the matter at hand. The fact that Kentucky Carbon refused to voluntarily reinstate Bobby Gooslin after the Mine Safety and Health Administration determined that Gooslin's discharge was a violation of section 105(c) of the Act should not be considered as a lack of good faith; after all, Kentucky Carbon was exercising its right to contest said MSHA findings by means of civil litigation as prescribed within the Federal Mine Safety and Health Act of 1977.

4. History - Kentucky Carbon Corporation was a respondent in three prior 105(c) discrimination cases filed with the Federal Mine Safety and Health Review Commission. However, all three cases were settled without an affirmative finding of a section 105(c) violation.

5. Size - Kentucky Carbon Corporation is a large operator.

6. Ability to Remain in Business - The agreed penalty will not affect Kentucky Carbon Corporation's ability to remain in business.

It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977."

$1,000.00 to the Secretary of Labor within 30 days from the date of this decision.

Michael A. Lasher, Jr., Judge

Distribution:

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FEB 23 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 79-7-M
	:	A/O No. 47-02546-05001 R
v.	:	
	:	Sherman Lime and Rock Quarry
SHERMAN LIME AND ROCK COMPANY, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Thomas Eder, Partner, Sherman Lime and Rock Company, Elk Mound, Wisconsin, for the Respondent.

Before: Judge Cook

I. Procedural Background

On May 4, 1979, the Secretary of Labor (Secretary) filed a petition for assessment of civil penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act). The petition charges Sherman Lime and Rock Company (Respondent) with a violation of section 103(a) of the 1977 Mine Act as set forth in a citation issued pursuant to section 104(a) of the 1977 Mine Act.

The Respondent failed to file an answer and, on September 30, 1980, Chief Administrative Law Judge James A. Broderick issued an order to show cause requiring the Respondent to either file an answer within 15 days or to show good reason, in writing, for its failure to do so. The Respondent filed an answer on October 22, 1980. On November 19, 1980, an order was issued by the undersigned Administrative Law Judge receiving the answer for late filing.

Various notices of hearing were issued which ultimately scheduled the

reply brief on August 19, 1981.

II. Violation Charged

Citation No.	Section	Date
287437	103(a)	May 11, 1978

III. Witnesses and Exhibits

A. Witnesses

Both the Secretary and the Respondent called Robert C. Goins, a Feder mine inspector, and Thomas Eder, a partner in the Respondent, as witnesses

B. Exhibits

1. The Secretary introduced the following exhibits in evidence:

M-1 is a three-page document containing copies of Citation No. 28 section 103(a), May 11, 1978; and the May 12, 1978, modification thereof.

M-2 is a copy of the inspector's statement pertaining to M-1.

M-3 is a certified copy of a court record in the case of Secretar of Labor v. Thomas Eder, Pat Eder, and Mike Eder, t/d/b/a Sherman Lime and Rock Company, Civil Action No. 78-C-273 (W.D. Wis.), certified by the Cler of the United States District Court for the Western District of Wisconsin, which contains copies of the complaint (filed June 22, 1978), the answer (filed July 17, 1978), and the consent judgment (filed November 2, 1978).

2. The Respondent introduced the following exhibits in evidence:

O-1 is a copy of an order issued on July 13, 1978, in the case of Secretary of Labor v. Thomas Eder, Pat Eder, and Mike Eder, t/d/b/a Sherma Lime and Rock Company, Civil Action No. 78-C-273 (W.D. Wis.), denying the Plaintiff's motion for a preliminary injunction.

O-2 is a letter dated September 5, 1978, from Richard L. Wachowsk Esq., to Mr. Thomas Eder.

O-3 is a letter dated September 8, 1978, from Richard L. Wachowsk Esq., to Mr. Thomas Eder.

O-4 is a letter dated September 14, 1978, from Richard L. Wachowsl Esq., to Mr. Thomas Eder.

a violation of section 103(a) of the 1977 Mine Act occur, and (2) what a
should be assessed as a penalty if a violation is found to have occurred
determining the amount of civil penalty that should be assessed for a vi
tion, the law requires that six factors be considered: (1) history of p
vious violations; (2) appropriateness of the penalty to the size of the
operator's business; (3) whether the operator was negligent; (4) effect
the penalty on the operator's ability to continue in business; (5) gravi
of the violation; and (6) the operator's good faith in attempting rapid
abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

The parties entered into the following stipulations 1/ on March 12,
1981:

1. At all times relevant to this matter, Thomas, Patrick, and Mich
Eder traded and did business as Sherman Lime and Rock Company (Tr. 5).

2. At all times relevant to this matter, the Respondent operated a
mine (quarry) located west of Menomonie, Dunn County, Wisconsin (Tr. 6).

3. A citation for violation of section 103(a) of the 1977 Mine Act
was written by Inspector Robert C. Goins on May 11, 1978. The citation
was mailed to the Respondent on May 12, 1978, due to the Respondent's
refusal to accept personal service on May 11, 1978 (Tr. 6).

4. The Respondent is a small, family-owned business (Tr, 11).

5. The Respondent's Sherman Lime and Rock Quarry produced approxim
2,000 tons in 1978 (Tr. 11-12).

B. Occurrence of Violation

Federal mine inspectors Robert C. Goins and John L. Davidson arrive
the Respondent's Sherman Lime and Rock Quarry at approximately 7:50 a.m.
May 11, 1978, to conduct a safety and health inspection pursuant to the
sions of the 1977 Mine Act (Exh. M-1). The inspectors identified themse
and informed Patrick and Michael Eder as to the purpose of their visit
M-1). The inspectors were told that the Respondent's operation was a fa
owned and operated business, that there was nothing to inspect, and that

1/ The parties also agreed that "[t]his shall be a partial stipulation
some of the facts involving the actual case and shall not be construed a
precluding either party from presenting additional evidence to the Court

be allowed onto the property for the purpose of conducting an inspection (Exh. M-1). The inspectors asked Patrick and Michael Eder if they would accept a citation, and they responded in the negative. The inspectors lef the facility at approximately 8:25 a.m.

Later that day, Inspector Goins prepared Citation No. 287437 charging the Respondent with a violation of section 103(a) of the 1977 Mine Act in that "Robert C. Goins and John L. Davidson, MSHA mine inspectors, were refused entry to the Sherman Lime and Rock Quarry at 0750. After letting operators read memorandum from Thomas Shepich, 4-27, the operators still refused entry to the quarry * * *" (Exh. M-1). The citation was mailed to the Respondent by certified mail on May 12, 1978, due to the Respondent's refusal to accept personal service on May 11, 1978 (Exh. M-1).

Section 103(a) of the 1977 Mine Act provides, in part, that "[f]or th purpose of making any inspection or investigation under this Act, the Secr tary, * * * with respect to fulfilling his responsibilities under this Act or any authorized representative of the Secretary * * *, shall have a righ of entry to, upon, or through any coal or other mine."

The Respondent defends against the charge of violation by maintaining that it was under no legally enforceable duty on May 11, 1978, to grant th authorized representatives of the Secretary entry to, upon, or through the Sherman Lime and Rock Quarry for the purpose of conducting a health and safety inspection.

The material facts reveal that the Respondent is a small, family-owne business which is organized as a partnership. The Sherman Lime and Rock Quarry is located in Dunn County, Wisconsin, and consists of a limestone quarry and related milling operation used to produce agricultural lime. T agricultural lime is sold to farmers in the immediate geographic area who it to neutralize soil acidity, and it appears that the Respondent delivers the agricultural lime to its customers. However, the Respondent does not sell any of its products outside the State of Wisconsin. The business is seasonal, operating only during the fall and spring for a total of approxi mately 4 months per year. Additionally, it appears that the Respondent wa making deliveries and performing maintenance work on May 11, 1978, but tha no actual mining or milling activities were underway at the time of the attempted inspection.

It appears that the partnership is composed solely of Patrick, Michae and Thomas Eder. Mr. Thomas Eder testified that Patrick Eder, Michael Eder, and he are the only individuals who work at the facility . However, he also testified that the Respondent occasionally enters into contracts with powder companies who perform at least some of the drilling and blasti operations necessary to extract the limestone from the earth. According t Mr. Eder, the drilling and blasting operations are performed by one person

dump truck, an Allis Chalmers patrol grader, and a Cedar Rapids plant. Acc
ing to Inspector Goins, the Cedar Rapids plant consisted of a jaw crusher,
hammermill and probably a small rollmill. Mr. Eder testified that a shovel
a loader, a primary hammermill, trucks, and several Gardner Denver drill ri
are used at the facility. Mr. Eder further testified that the Respondent
used Ford, International, and Chevrolet trucks. Additionally, he testifie
that most of the equipment is "purchased local or as close to local as
possible." It appears that all of the equipment was purchased in Wisconsi
The Respondent makes use of the telephone to communicate with its customer
and has made occasional use of newspapers to advertise its products.

Following the May 11, 1978, denial of entry, the Secretary filed a civ
action in the United States District Court for the Western District of
Wisconsin pursuant to section 108 of the 1977 Mine Act to obtain injunctive
relief. 2/ Secretary of Labor v. Thomas Eder, Pat Eder, and Mike Eder,
t/d/b/a Sherman Lime and Rock Company, Civil Action No. 78-C-273 (Exh. M-3)
The Secretary's complaint, filed on June 22, 1978, alleged that at all rele
vant times mentioned therein, Thomas, Pat, and Mike Eder traded and did
business as Sherman Lime and Rock Company, and operated a mine subject to t
1977 Mine Act in or near Menomonie, Dunn County, Wisconsin, within the juri
diction of the United States District Court for the Western District of
Wisconsin; that on May 11, 1978, pursuant to section 103 of the 1977 Mine A
authorized representatives of the Secretary went to the mine operated by th
Defendants to conduct a health and safety inspection of that mine; and that

2/ Section 108(a)(1) of the 1977 Mine Act provides as follows:

"The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent-

"(A) violates or fails or refuses to comply with any order or decisio issued under this Act,

"(B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare o his authorized representative, in carrying out the provisions of this Act,

"(C) refuses to admit such representatives to the coal or other mine,

"(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine,

"(E) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this Act, or

"(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this Act."

Defendants, their agents and employees and all persons in active concert participation with them be preliminarily and permanently enjoined: from refusing to admit authorized representatives of the Secretary to, n or through the Defendants' mine; (2) from refusing to permit the pection of the mine by authorized representatives of the Secretary; from interfering with, hindering, and delaying authorized representatives the Secretary in carrying out the provisions of the 1977 Mine Act; and for such other relief as the Court may deem just and proper.

The Defendants filed an answer on July 17, 1978, admitting all of the ve-stated factual allegations in the complaint with the exception of the egation that the Defendants' mine is subject to the 1977 Mine Act. That egation was specifically denied.

The affidavit of Federal mine inspector Robert C. Goins was attached to complaint and incorporated therein by reference. The affidavit states, part, as follows:

"1. I am an authorized representative of the Secretary of Labor employed MSHA as a Metal and Nonmetal Mine Inspector and assigned to the Madison, consin field office. In this capacity I conduct inspections and investiga- ns of mines pursuant to Section 103 of the Federal Mine Safety and Health of 1977. I have personal knowledge of the facts and circumstances con- ned herein.

"2. On May 11, 1978, accompanied by John L. Davidson I went to the rman Lime and Rock Company quarry located west of Menomonie, Dunn County, consin. The mine is owned by Tom Eder and operated by him and his two s, Pat and Mike.

"3. We arrived at the quarry at 7:30 A.M. and met Pat Eder at the gate. approached our car and asked what we wanted. We introduced ourselves and ormed him that we were on his property to conduct an inspection. Mr. Eder ed, 'What is there to inspect?' At this point Mike Eder arrived and ned in the conversation.

"4. Mike Eder stated that the company, being family owned and not having employees, was not within the coverage of the Act. We explained to Eder that we believed that Public Law 95-164 applied to their mine.

"5. Mike Eder said, 'If I allow you in here now, you could come any e and close us down. No one is coming in here to inspect us.' We asked h brothers if they were denying us the right of entry. Both brothers ponded, 'Yes.'

"6. We explained to the Eders that we would be required to issue a ation for their refusal of the statutory right of entry. The brothers d us to issue the citation but that we would not be allowed on the prop- y to inspect. They also would not accept the citation, and therefore had be mailed by certified mail to the company office.

"7. We left the property at 8:25 A.M."

as evidenced by the signatures of their respective attorneys. The "consent judgment" provides as follows:

> This matter having come before the Court on the Complaint filed in the captioned matter, and the parties having stipulated to the material allegations of the Complaint as evidenced by the signatures of their attorneys, and the Court having considered the same; it is hereby ORDERED:
>
> That Thomas Eder, Pat Eder, and Mike Eder, now doing business as Sherman Lime and Rock Company, their agents and employees, and all persons in active concert and participation with them be permanently enjoined as follows:
>
> 1. From refusing to admit authorized representatives of the Secretary entry to, upon or through defendants' mine;
>
> 2. From refusing to permit the inspection of the mine by authorized representatives of the Secretary; and
>
> 3. From interfering with, hindering, and delaying the Secretary of Labor or his authorized representatives in carrying out the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. 801-961 (1971 and Supp. 1978).

The Respondent appears to concede that its limestone quarry and related milling operation falls within the definition of "coal or other mine" set forth in section 3(h)(1) of the 1977 Mine Act. 4/ The Respondent argues that the May 11, 1978, denial of entry was lawful because: (1) it is not engaged in an activity in or affecting interstate commerce; (2) the 1977 Mine Act's coverage does not extend to small, family-owned and operated mine

4/ Section 3(h)(1) of the 1977 Mine Act provides as follows:

"'[C]oal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposts in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of

by the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures; and (4) active mining and milling operations were not underway at the time of the attempted inspection.

I conclude that the "consent judgment" entered by the United States District Court for the Western District of Wisconsin on November 2, 1978, prevents the Respondent from raising these four defenses in the instant civil penalty proceeding because, as a general rule, consent decrees in equity are accorded res judicata effect. Safe Flight Instrument Corporation v. United Control Corporation, 576 F.2d 1340 (9th Cir. 1978); Wallace Clark & Co., Inc v. Acheson Industries, Inc., 532 F.2d 846 (2nd Cir. 1976). Both the Federal Court action which culminated in the entry of the "consent judgment" and the instant civil penalty proceeding arise from the same May 11, 1978, denial of entry. The wording of the "consent judgment," on its face, reflects an adjudication by the Court that the Respondent's mine and related milling operation falls within the statute's coverage and that the May 11, 1978, denial of entry was unlawful. See Wallace Clark & Co., Inc. v. Acheson Industries, Inc., supra (similarly worded consent decree characterized as an adjudication).

The Respondent is clearly attempting to mount a collateral attack on the District Court's "consent judgment" in this proceeding. "[A] collateral attack is an attempt to avoid, defeat, or evade a judicial decree, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." 1B J. MOORE, FEDERAL PRACTICE, ¶ 0.407 at 934 (1980). The statute does not empower the Federal Mine Safety and Health Review Commission (Commission) to entertain a collateral attack on a Federal District Court's section 108 injunction. Accordingly, the Respondent's attempt to avoid, defeat, or evade the injunction, or to deny the injunction's force and effect, in this proceeding must fail.

As an alternative basis for decision, I conclude that the four defenses fail on the merits.

The Respondent maintains that it is not subject to the provisions of the 1977 Mine Act by arguing that its products do not enter commerce, nor do its products or operations affect commerce. Section 4 of the 1977 Mine Act provides that "[e]ach coal or other mine, the product of which enter commerce, or the operations or products of which affect commerce, and each operator of

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fn. 4 (continued)
administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment."

Operations such as the Respondent's have been held to fall within this definition. Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1702, 2 BNA MSHC 1376 CCH OSHD Par. (1981).

373 F. Supp. 797 (W.D. Pa. 1973), and argues that none of its products cro
state lines.

The evidence shows that the Respondent's agricultural lime is sold wh
within the State of Wisconsin to farmers who use it to neutralize soil aci
The Respondent delivers the agricultural lime to its customers, and has us
Ford, International, and Chevrolet trucks. The Respondent uses certain equ
ment, identified previously in this decision, in its operation; uses the te
phone to contact its customers; and has made occasional uses of newspapers
advertise its products. In view of the decisions in Marshall v. Anchorage
Plastering Company, No. 75-2747, 6 OSHC 1318 (9th Cir., filed February 2,
1978), and Marshall v. Bosack, 463 F. Supp. 800 (E.D. Pa. 1978), I conclude
that the Respondent's products or operations affect commerce within the mea
ing of section 4 of the 1977 Mine Act.

The Respondent's reliance on Morton v. Bloom, supra, is misplaced.
Bloom involved a one-man mine operation whose coal was sold "exclusively
within Pennsylvania." 373 F. Supp. at 798. The Court held that this opera
tion was not the type which Congress intended to cover when it enacted the
Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq.
(1970). More significantly, the Court found itself unable to conclude "tha
defendant's one-man mine operation will substantially interfere with the
regulation of interstate commerce." 373 F. Supp. at 799. Even under the
standard set forth by the United States Supreme Court in Wickard v. Filburn
317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942), the Court determined that
the operation was "one of local character in which the implementation of
safety features required by the Act will not exert a substantial economic
effect on interstate commerce." 373 F. Supp. at 799.

A review of the Court's reasoning in Bloom indicates that it should n
be followed in the instant case. First, it appears that the Court failed t
properly consider all of the possible means by which the operation could ha
affected commerce. The Court noted at one point in its opinion that the
"defendant does use some equipment in his mine which was manufactured outsi
of Pennsylvania * * *," 373 F. Supp. at 798, but determined that this did n
bring the mine within the scope of the commerce clause since the purchase o
the equipment was "so limited that its use would be de minimis." 373 F. Su
at 798. This reasoning appears to run contrary to the United States Supren
Court's determining in Mabee v. White Plains Publishing Co., 327 U.S. 178,
181, 66 S. Ct. 511, 90 L.Ed. 607 (1946), that the de minimis maxim should
not be applied to commerce clause cases absent a Congressional intent to ma
a distinction on the basis of volume of business. The 1977 Mine Act does n
require the effect on commerce to be substantial before a mine can be held
to fall within the statute's coverage. See Marshall v. Bosack, supra.

Second, "[e]ven activity that is purely intrastate in character may be
regulated by Congress, where the activity, combined with like conduct by
others similarly situated, affects commerce among the States or with foreig

have on commerce. The Court in Bosack considered these effects and determined that such operations or their products affect commerce.

The Respondent's second argument asserts that the 1977 Mine Act's coverage does not extend to small, family-owned and operated mines in which the owners are the only miners. 5/ This argument is without foundation because owner-operated mines in which the owners are the only miners have been held to be subject to the provisions of the 1977 Mine Act. Marshall v. Sink, 614 F.2d 37, 38 n. 2 (4th Cir. 1980); Marshall v. Kraynak, 604 F.2d 231 (3rd Cir. 1979); Marshall v. Kniseley Coal Company, 487 F. Supp. 1376 (W.D. Pa. 1980); Marshall v. Donofrio, 465 F. Supp. 838 (E.D. Pa. 1978); Marshall v. Bosack, 463 F. Supp. 800 (E.D. Pa. 1978); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976).

The Respondent's third argument asserts that nonconsensual safety and health inspections conducted without a search warrant violate the right guaranteed by the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures. This argument is rejected. The United States Supreme Court has held that warrantless safety and health inspections authorized by section 103(a) of the 1977 Mine Act are constitutionally permissible and do not violate the Fourth Amendment. Donovan v. Dewey, No. 80-901 (U.S. Supreme Court, filed June 17, 1981). See also, Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980); Marshall v. The Texoline Company, 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichuckey Sand Company, 606 F.2d 693 (6th Cir. 1979); Marshall v. Stoudt's Ferry Preparation Company 602 F.2d 589 (3rd Cir. 1979); Marshall v. Cedar Lake Sand & Gravel Company, Inc., 480 F. Supp. 171 (E.D. Wis. 1979); Marshall v. Donofrio, 465 F. Supp. 838 (E.D. Pa. 1978), aff'd., 605 F.2d 1194 (3rd Cir. 1979).

Finally, the Respondent argues that the May 11, 1978, denial of entry was lawful because active mining and milling operations were not underway at the time of the attempted inspection. This argument is without foundation because it appears that the Respondent was performing maintenance work and delivering agricultural lime to customers on May 11, 1978. In Marshall v. Gilliam, 462 F. Supp. 133 (E.D. Mo. 1978), it was held that the cessation of active mining operations in the pit area does not suspend the provisions of the 1977 Mine Act when the mine operator continues to load and ship previous mined minerals from his stockpile. So long as the operator continues to load and ship minerals from his stockpile, he may be inspected and regulated under the 1977 Mine Act.

The Respondent also appears to argue that a civil penalty cannot be imposed in this proceeding because a section 108(a)(1) injunction had not be

5/ Section 3(g) of the 1977 Mine Act defines the term "miner" as "any individual working in a coal or other mine." Thomas, Patrick, and Michael

(1981), the Commission held that a mine operator who denies an authorized representative of the Secretary the right of entry for the purpos of conducting an inspection commits a violation of section 103(a) of the 197 Mine Act for which a civil penalty must be assessed. The Commission express rejected the argument that the Secretary's exclusive remedy is an injunction under section 108(a)(1), stating that the statute provides the Secretary wit dual remedies: "an administrative remedy under sections 104 and 110(a), and a civil injunctive remedy under section 108(a)(1)." 3 FMSHRC at 1704.

In view of the foregoing, I conclude that the Respondent committed a May 11, 1978, violation of section 103(a) of the 1977 Mine Act for which a civil penalty must be assessed in this proceeding.

C. Negligence of the Operator

Federal mine inspector Robert C. Goins attempted to conduct an inspection at the Respondent's Sherman Lime and Rock Quarry on October 6, 1977, pursuant to the provisions of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1966 Metal Act). 6/ The Respondent refused to allow Inspector Goins to conduct the inspection.

Mr. Thomas Eder testified that a "mutual agreement" existed amongst the partners which predated May 11, 1978, to refuse entry to Federal mine inspec tors. He further testified that he agreed with his sons' decision to refus entry to Inspectors Goins and Davidson.

In view of the foregoing, it is found that the May 11, 1978, denial of entry was accompanied at least by ordinary negligence.

D. Gravity of the Violation

A denial of entry is a serious violation of the 1977 Mine Act. One of the principal purposes of inspections conducted pursuant to the provisions of the 1977 Mine Act is to detect violations of the mandatory health and safety standards and to determine whether imminent dangers exist, and to order the abatement of any violations or imminent dangers found so as to remove the associated hazards from the miners' work environment. Absent entry to the mine, these salutary and Congressionally mandated objectives cannot be achieved.

6/ The Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 STAT. §§ 1290-1322, amongst other things, enlarged the definition of mine set forth in section 3(h) of the 1969 Coal Act to include those mine previously covered by the 1966 Metal Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFET AND HEALTH ACT OF 1977 at 647 (1978).

the Respondent. In fact, the Respondent appeared to concede during his clo argument that "plenty" of safety factors needed correction.

In view of the foregoing, it is found that the violation was serious.

E. Good Faith in Attempting Rapid Abatement

Mr. Thomas Eder testified that he is unwilling to comply with Judge Doyle's November 2, 1978, order and allow Federal mine inspectors to inspect his property. He testified that he would prohibit Federal mine inspectors from conducting inspections, and indicated that he would temporarily close the mine in order to avoid an inspection.

F. Size of the Operator's Business

The parties stipulated that the Respondent is a small, family-owned business, and that the Sherman Lime and Rock Quarry produced approximately 2,000 tons in 1978.

In view of the foregoing, it is found that the Respondent is small in size.

G. History of Previous Violations

The Secretary concedes that the Respondent has no history of previous violations (Tr. 73).

H. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

No evidence was presented to establish that the assessment of a civil penalty in this proceeding will affect the operator's ability to remain in business. 7/ In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

7/ Business and tax records are the type of evidence necessary to establis a claim of financial impairment. Hall Coal Company, 1 IBMA 175, 180, 79 I. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), see also, Davi Coal Company, 2 FMSHRC 619, 1 BNA MSHC 2305, 1980 CCH OSHD par. 24,291 (198 (Lawson, C., dissenting).

business.

VI. Conclusions of Law

1. The Sherman Lime and Rock Company and its Sherman Lime and Rock Quarry have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Robert C. Goins was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 287437.

4. The violation charged in Citation No. 287437 is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

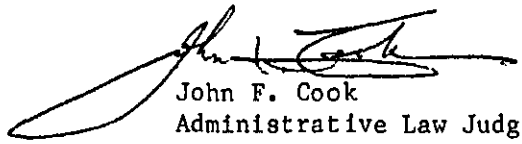
The Respondent delivered a closing argument on March 12, 1981. The Secretary and the Respondent filed posthearing briefs on April 21, 1981, and August 3, 1981, respectively. The Secretary filed a reply brief on August 19, 1981. Such briefs and closing argument, insofar a they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoi findings of fact and conclusions of law, I find that the assessment of a civil penalty is warranted as follows:

Citation No.	Date	Section	Penalty
287437	May 11, 1978	103(a)	$200

within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

Distribution:

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 23 1982

FRANKLIN D JOHNSON, Complainant	:	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
v.	:	
EASTERN ASSOCIATED COAL CORP., Respondent	:	Docket No. WEVA 80-647-D
	:	Keystone No. 2 Mine

DECISION

Appearances: Thomas L. Butcher, Esq., Pineville, West Virginia, for Complainant;
Sally S. Rock, Esq., Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Franklin D. Johnson under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq., the "Act," alleging that Eastern Associated Coal Corp. (Eastern) discharged him on March 20, 1980, in violation of section 105(c)(1) of the Act. 1/ An evidentiary hearing was held on Mr. Johnson's complaint in Beckley, West Virginia, on August 18 and 19, 1981. On January 18, 1982, the case was transferred to the undersigned Judge and the parties agreed to submit the case to this Judge for decision on the existing record.

Mr. Johnson can establish a prima facia violation of section 105(c)(1) of the Act if he proves by a preponderance of the evidence that he has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary of Labor ex rel David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd. on other grounds, Consolidation Coal Co. v. Secretary, 663 F2d 1211 (3d Cir. 1981). Before his discharge, Johnson was night shift foreman in the 3 right 3 west section of Eastern's

shift mine foreman and Johnson's immediate supervisor, expressing disapproval of orders by Snow to "cut 6 foot [roof] bolts into 4 foot bolt and to put them up", and (2) to Snow and to general mine foreman Donzal Morgan, complaining that the preceding day shift foreman, Don Moore, ha been leaving Johnson's workplace unsafe by "cutting places in the mine too deep and too wide" and by leaving excessive coal accumulations. Eastern denies that Johnson made any complaint to Snow about the shortening of roof bolts and maintains that although discussions during the period March 10 to March 20, 1980, did, indeed, take place among Johnson, Snow, and Morgan, concerning the conditions and mining practices where Johnson had been working, including the need for additional clean up, rock dusting, and ventilation, these discussions did not constitute "safety complaints" within the meaning of the Act.

Even assuming, arguendo, that the complaints were in fact made to Tyler Snow and Donzal Morgan as alleged and even assuming, arguendo, that those complains were protected activity under Section 105(c)(1), I do not find in this case any direct evidence, nor sufficient circumstantial evidence, to prove that the individual who made the decision t discharge Johnson had any knowledge at that time of any such complaints I conclude therefore that Johnson's discharge could not have been motivated in any part by the alleged protected activity and that accordingl there has been no violation of the Act. Pasula, supra.

I find that, ultimately, the decision to discharge Johnson was independently made by the senior official of the Keystone No. 2 mine, Mine Superintendent Wayne Jones. While there is no question that mine foreman Donzal Morgan was the individual who informed Johnson of his discharge, it is apparent from the credible evidence of record that Morgan was essentially only carrying out the orders of the mine superintendent. According to Superintendent Jones, he told Morgan that "Johnson has got to go * * * [i]f you don't do it, I will". It is apparent that Jones made this decision spontaneously and independently during a personal inspection of the mine on the morning of March 20th. Jones and Eastern's safety inspector Dallas Peters were inspecting the mine early that morning in anticipation of a government "blitz" inspection. According to Jones, the 3 right 3 west section, which had last been worked by Johnson, was in "miserable" condition. It was "filthy dirty" with excessive coal dust, loose coal accumulations, and insufficient rock dusting. In particular, there was coal spillage up to the bottom of the conveyor belt some 24 to 26 inches deep for a distance of about 150 feet. In addition, Jones found seriously inadequate ventilation of the section in an area of well known methane problems. In sum, Jones found the conditions left by Johnson so unsafe he concluded there was an "imminent danger". The section was immediately closed down, and it took more than a full shift of cleanup work to get it back

conditions. Indeed, he unequivocally admits that his section was neither adequately cleaned nor properly rock dusted and that he was accordingly in violation of company standards.

Superintendent Jones decided on the spot that Johnson would have to go and recalled that he later directed Donzal Morgan to carry out that decision. Morgan recalled discussing Johnson's status with Jones but thought that he had made the decision to discharge Johnson by himself. I find Morgan's testimony uncertain and equivocal in this regard and I therefore find Jones' testimony the more persuasive. It is clear that no other decision would in any event have been tolerated by Jones. Since it is neither alleged nor proven that Jones had any knowledge of Johnson's purported safety complaints to Snow and Morgan, I cannot find that the discharge of Johnson by Jones was motivated in any part by such complaints.

Even assuming, arguendo, that Donzal Morgan had participated in the decision to discharge Johnson, it would have been untainted by any improper motive. It is not alleged that Morgan had knowledge of the complaints Johnson purportedly made to Snow about shortening roof bolts and there is insufficient evidence, in any event, to support such a claim. Johnson nevertheless initially maintained that he had complained over a period of 3 months to both Snow and Morgan about the conditions left in his section by the preceding day shift foreman, Don Moore. Under cross examination, Johnson did, however, retract and admit that he had followed Moore on no more than five occasions within a period of less than two weeks and actually complained only two or three times. Johnson continues to maintain that on one of those occasions, he called Snow to report that Moore had taken a 23 foot cut of coal in an entry -- a deeper cut than normally allowed. Johnson allegedly reported that Moore had failed to "timber it down to standard" so that it was unsafe to work in the entry until his own crew had performed that task. On the other occasions, he apparently called Snow because Moore had left the section without adequate cleaning and rock dusting.

Neither Snow nor Morgan deny that they had from time to time received such routine reports from Johnson, just as they had from other foremen. It was the regular practice at the mine for the oncoming section foreman to report such conditions to the shift foreman to explain delays in beginning production and that is the context in which Johnson's reports were taken. At no time did Johnson or his crew refuse to work because of unsafe conditions. Inasmuch as it was the accepted and routine practice at the mine for oncoming foremen to make such calls to their superiors in explaining their inability to begin immediate production, that such calls were routinely made by other foremen without any evidence of discrimination against them, and that the operator's stated grounds for discharging Johnson have a legitimate and strong factual basis in the record, I conclude that even if Morgan had parti-

plaint herein is therefore denied and the case dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Issued:

Distribution: By certified mail.

Thomas L. Butcher, Esq., P.O. Box 995, Pineville, WV 24874

Sally S. Rock, Esq., Eastern Associated Coal Corporation, Koppers Building, PIttsburgh, PA 15219

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DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. McDOWELL QUARRY COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET NO. CENT 80-247-M A/C No. 23-00759-05002 H DOCKET NO. CENT 80-248-M A/C No. 23-00759-05003 MINE: Blinne Quarry

Appearances:

James R. Cato, Esq., Office of Tedrick A. Housh, Jr.,
Regional Solicitor, United States Department of Labor
Kansas City, Missouri
For the Petitioner

William McDowell, appearing Pro Se,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, McDowell Quarry Company, w violating two regulations adopted under the Federal Mine Safety and He Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in R Missouri.

ISSUES

The issues are whether respondent violated the regulations. If a violations occurred, what penalties, if any, are appropriate.

CENT 80-247-M

In this case respondent is charged with violating Title 30, Code Federal Regulations, Section 56.9-3. 1/

On August 8, 1979, MSHA representative Willard J. Graham inspected a Terex loader at the McDowell Quarry (Tr. 12-13). The loader was being operated out of a pit. He checked the brakes by backing up the equipment on a 10 foot incline. The brakes would not hold the Terex (Tr. 24).

The inspector ordered the loader taken out of service because of the hazards: an uneven roadway combined with a 10 percent grade. These features could cause a situation of imminent danger to the workers at the site (Tr. 23, 24, 26, 31-34).

It was the Terex operator's first day on the job (P2). The MSHA inspector credits the operator with stating that he hadn't "had any" brakes. However, I believe McDowell's contrary version to the effect that the Terex had brakes that morning. Initially, when confronted with the operator's statement, McDowell immediately denied it. Further, I find his direct testimony to be credible. He had run the loader himself that morning and the brakes were adequate at that time (Tr. 29, 56-59).

Petitioner offered a flurry of evidence to the effect that William McDowell, owner of the quarry, should have known the Terex brakes were about to fail. I am not persuaded. MSHA inspector Howard Lucas testified that Terex brakes can give "little warning" of a failure (Tr. 69). This basically supports McDowell's view that brakes of this type can fail, as they did here, without any warning (Tr. 55).

In summary, the evidence supports the conclusion that the Terex mobile equipment did not have adequate brakes as required by 30 C.F.R § 56.9-3. The additional matters relating to William McDowell's personal knowledge of the brakes failing does not avoid the violation but addresses the negligence evaluation in assessing a civil penalty.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Petitioner proposes a penalty by way of a special assessment in the amount of $750. Petitioner's narrative findings rely to a large degree on petitioner's perception of the negligence of management in failing

morning of the inspection.

Considering the statutory criteria, I deem that a civil penalty of $75 is appropriate for this violation.

CENT 80-248-M

In this case respondent is charged with violating Title 30, Code of Federal Regulations, Section 56.5-50B 2/

2/ The cited regulation, including the permissible noise exposure in 56.5-50(a), provides, in part, as follows:

56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specification for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018. or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If su controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to

On July 20, 1979 MSHA representative Willard J. Graham sampled the McDowell Quarry crusher operator for possible excessive noise exposure (Tr. 70-71, 77).

The inspector used a dosimeter and a dBA meter. The devices had be properly calibrated and the inspector spent most of the day with the crusher operator (Tr. 76, 79).

When the crusher was not crushing any rock the dBA meter showed a to 94 level. When crushing rock the noise level ran 105 to 110 dBA. Th noise exposure was taken for 465 minutes and the exposure, according to dosimeter, was 300%. The operating manual interpolates 307% into 98 dB and 286% into 97.5 dBA (Tr. 81, 82).

The quarry abated this condition by building a shack for the crushe operator. This reduced the noise level a significant amount, to 39 percent (Tr. 83-86).

DISCUSSION

The uncontroverted evidence establishes a violation of 30 C.F.R. 56.5-50.

The quarry contends the proposed civil penalty of $40 is excessive because the quarry was shut down for a time while the condition was aba I find that although the quarry abated the condition I do not conclude the proposed penalty is excessive.

Based on the foregoing findings of fact and conclusions of law I e the following

ORDER

CENT 80-247-M

1. Citation 189161 is affirmed.

2. A civil penalty of $75 is assessed.

CENT 80-248-M

1. Citation 189138 is affirmed.

2. The proposed civil penalty of $40 is affirmed.

James R. Cato, Esq.
Office of the Solicitor
United States Department of Labor
911 Walnut Street, Room 2106
Kansas City, Missouri 64106

Mr. William McDowell
McDowell Quarry Company
Edgar Star Route
Box 368
Rolla, Missouri 65401

WASHINGTON, D.C. 20006

February 26, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-387
	:	A/O No. 33-00968-03059
v.	:	
	:	Nelms No. 2 Mine
YOUGHIOGHENY AND OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner, MSHA; Robert C. Kota, Esq., Youghiogheny and Ohio Coal Company, St. Clairsville, Ohio, for Respondent, Youghiogheny and Ohio Coal Company.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Youghiogheny and Ohio Coal Company for an alleged violation of 30 C.F.R. 75.200. A hearing was held on December 15, 1981.

At the hearing the parties agreed to the following stipulations:

(1) The subject mine constitutes a coal mine, the products of which enter commerce or the operations or products of which affect commerce. Respondent operates and at all times pertinent to the citation at issue, operated the subject mine. Respondent and every miner employed in this mine, are subject to the provisions of the 1977 Act.

(2) Jurisdiction of this case vests in the Federal Mine Safety and Health Review Commission.

produced one million three hundred and forty-five thousand, six hundred and thirty-one tons of coal, during the year 1979. (Based upon this factor, I found that operator is large in size.)

(4) Any penalty assessed herein, will not affect respondent's ability to continue in business.

(5) The inspector is, and at all times pertinent hereto was an authorized representative of the Secretary of Labor.

(6) The operator's history of prior violations is moderate.

(7) The alleged violation was abated in good faith.

(8) All witnesses who will testify are accepted generally as experts in Mine Health and Safety.

The subject citation dated May 27, 1980, charges a violation of 30 C.F.R. 75.200 under the following circumstances:

The company's approved roof control plan was not being complied with in No. 29 room of the 7 west off 2 south working section which the continuous mining machine was operating. The mine roof was broken from 2 to 10 inches in thickness for a distance of 18 feet and 8 feet in width in which roof mats were being used and the area had not been center bolted or other supports installed where subnormal roof conditions existed.

The citation was abated in fifteen minutes.

A modification to the citation was issued on June 3, 1980, as follows:

Citation No. 0783977 is being modified to show that the company had installed 3 additional roof mats as additional support in the area; however, the roof was still not adequately supported in that the broken area was hanging down

The operator's roof control plan provides in pertinent part:

> The roof support specified is considered the minimum required. Additional bolts or other support will be installed where conditions require.

The cited roof is a rectangular area of the dimensions set forth in the citation defined by a crack running all the way around and hanging down. Part of one side of this area is adjacent to one where a roof fall previously occurred (Tr. 15, Op. Exh. No. 1). Under the roof control plan roof mats are required to be placed on five-foot centers (Tr. 16). In the affected area three extra mats were installed so that the mats were on 2 1/2 foot centers (Tr. 16). The inspector testified that when he originally issued the citation he did not realize that additional roof mats had been installed and that to take account of this, the modification was subsequently issued (Tr. 24-25, 27-31). At the hearing however, the inspector adhered to the position that the roof mats were not additional supports within the meanin of the roof control plan and that therefore, the plan was violated. I believe the inspector is wrong in this respect. The roof control plan quoted above, requires "additional bolts or other support" where conditions require. The plan does not specify what other support should be used and more importantly, it does not rule out the use of roof mats. On the contrary, the general direction that roof bolts or other support are allowable indicates that mats are permissible. If the plan is to prohibit or require use of certain types of support under certain circumstances, the plan must say so. Not only does the plan not have any such provision, but the inspector and the operator's section foreman testified that the plan requires center bolts where rooms are going to be left standing over an extended period of time which was not the situation here (Tr. 41, 55). The fact that the plan explicitly mandates center bolts in certain cases demonstrat that where, as here, nothing is said, the plan cannot be interpreted to require such bolts.

The operator adopts a roof control plan and MSHA approv it. An inspector cannot, after the fact, read into the plan things which are not there and which the operator cannot be expected to know. Accordingly, I conclude there was no violation of the roof control plan.

matter the evidence is in conflict. The inspector expressed the view that because the mats did not have center bolts they did not support the middle of the entry (Tr. 32, 35). The inspector admitted that his determination that the mats were inadequate was a judgement call but the basis for that call is not apparent since he did not know how much weight was involved in the roof area covered by the mats (Tr. 36-37 38-39). The operator's section foreman was of the opinion that the roof mats did sufficiently support the middle of th entry (Tr. 52-54). The section foreman had one of his men test the roof and determined that only the immediate roof wa broken and he stated that since the roof was hanging near th left side towards the adjacent fall area, not in the middle the stress was on the left side not in the middle (Tr. 54, 56-58, 60). I find the section foreman's evidence persuasiv

The section foreman's evidence is not the only evidence in favor of the operator. The most persuasive evidence of record is that of a civil engineer who testified that according to an MSHA report (Op. Exh. No. 3) the roof mats could bear a 9,000 lb. load and that if the straps were on five foot centers the stress on the center of each strap would be 5700 lbs. and that therefore, in his opinion the strap would hold in the worst possible situation (Tr. 67). The engineer also explained how he determined the weight was 5700 lbs. (Tr. 80). As already noted, the inspector did not know what the weight was (Tr. 36-37). A safety factor of 1.5 to 2 is considered safe and the factor would be 1.6 on five foot centers (Tr. 68). Because of the additional straps, 2 1/2 foot centers were present here which would increase the safety factor. The civil engineer thought the safety mats installed by the operator were adequate to hold this roof and that center bolts were not necessary (Tr. 78). He stated straps were better than center bolts because as long as the strap is pulled tight at the lip of the fall, it would prevent material from falling off and thereby provide an added measure of safety (Tr. 81). The Solicitor did not cross-examine the engineer and did not produce any contrary evidence in rebuttal. I find the engineer's testimony convincing and accept it.

Based upon the testimony of the operator's witnesses I conclude the roof was adequately supported and that there was no violation of the mandatory standard.

Citation be VACATED and that the petition for assessment o
civil penalty be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Bldg., 1240 E. Ninth St., Cleveland, OH 44199

Robert C. Kota, Esq., Youghiogheny and Ohio Coal Company, P. O. Box 1000, St. Clairsville, OH 43950